

DEPARTMENT OF COMMERCE PROPOSED ANTI-DUMPING REGULATIONS AND OTHER ANTI-DUMPING ISSUES

HEARING BEFORE THE SUBCOMMITTEE ON TRADE OF THE COMMITTEE ON WAYS AND MEANS HOUSE OF REPRESENTATIVES ONE HUNDRED FOURTH CONGRESS SECOND SESSION

APRIL 23, 1996

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CONTENTS

Advisory of April 2, 1996, announcing the hearing	Page 2
---	-----------

WITNESSES

U.S. Department of Commerce, Hon. Susan G. Esserman, Assistant Secretary of Commerce for Import Administration	27
Congressional Budget Office, Jan Paul Acton, Assistant Director, Natural Resources and Commerce Division	53
U.S. International Trade Commission, Robert Rogowsky, Director of Operations	63

American Iron and Steel Institute, Robert J. Grow	158
Black, Edward J., Pro Trade Group, Inc., and Computer & Communication Industry Association	125
Boidock, John, Texas Instruments, and Semiconductor Industry Association ...	148
Cobb, Joe, Heritage Foundation	87
Committee To Preserve American Color Television, Lawrence E. Liles	137
Compaq Computer Corp., Joseph Tasker, Jr	119
Computer & Communication Industry Association, Edward J. Black	125
Corning, Inc., and Corning-Asahi Video Products Co., Timothy J. Regan	138
Enron Corp., Ken Dorland	115
Finger, Michael, World Bank	80
Geneva Steel, Robert J. Grow	158
Gridley, David D., Torrington Co	176
Grow, Robert J., American Iron and Steel Institute, and Geneva Steel	158
Hickey, William M., Jr., Lapham-Hickey Steel Corp., and Steel Service Center Institute	100
International Brotherhood of Electrical Workers, AFL-CIO, Lawrence E. Liles	137
Lapham-Hickey Steel Corp., William M. Hickey, Jr	100
Liles, Lawrence E., International Brotherhood of Electrical Workers, AFL-CIO, and Committee To Preserve American Color Television	137
Michelin North America, James C. Morton	111
Peterson, Hon. Pete, a Representative in Congress from the State of Florida ...	22
Pro Trade Group, Inc., Edward J. Black, Jr	125
Regan, Timothy J., Corning Inc., and Corning-Asahi Video Products Co	138
Semiconductor Industry Association, John Boidock	148
Suchman, Peter, Powell, Goldstein, Frazer & Murphy	125
Steel Service Center Institute, William M. Hickey, Jr	100
Stewart, Terrence P., Stewart and Stewart	184
Tasker, Joseph, Jr., Compaq Computer Corp	119
Texas Instruments, John Boidock	148
Torrington Co., David D. Gridley	176
Visclosky, Hon. Peter J., a Representative in Congress from the State of Indiana	15

SUBMISSIONS FOR THE RECORD

American Institute for International Steel, Inc., New York, NY, Horst E. Buelte, statement	196
American Wire Producers Association, Alexandria, VA, statement	200
Berg Steel Pipe Corp., Panama City, FL, Carl G. Seigler, letter and attachment	204
Buelte, Horst E., American Institute for International Steel, Inc., New York, NY, statement	196
Committee on Pipe and Tube Imports, and Weirton Steel Corp., joint statement	212

IV

	Page
Copper and Brass Fabricators Council, Inc., Joseph L. Mayer, statement and attachment	222
European Confederation of Iron and Steel Industries, statement	230
International Association of Drilling Contractors, statement	238
Mayer, Joseph L., Copper and Brass Fabricators Council, Inc., statement	222
Motorola, Inc., statement	239
National Association of Foreign-Trade Zones, statement	243
Palen, Gregory R., Spectro Alloys Corp., Rosemount, MN, letter	260
Seigler, Carl G., Berg Steel Pipe Corp., Panama City, FL, letter and attachment	204
Southern Tier Cement Committee, statement and attachments	250
Spectro Alloys Corp., Rosemount, MN, Gregory R. Palen, letter	260
Steel Manufacturers Association, statement	261
Weirton Steel Corp., and Committee on Pipe and Tube Imports, joint statement	212

**DEPARTMENT OF COMMERCE PROPOSED
ANTIDUMPING REGULATIONS AND OTHER
ANTIDUMPING ISSUES**

TUESDAY, APRIL 23, 1996

HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
SUBCOMMITTEE ON TRADE,
Washington, DC.

The Subcommittee met, pursuant to notice, at 11:09 a.m., in room 1100, Longworth House Office Building, Hon. Philip M. Crane (Chairman of the Subcommittee) presiding.

[The advisory announcing the hearing follows:]

ADVISORY

FROM THE COMMITTEE ON WAYS AND MEANS

SUBCOMMITTEE ON TRADE

FOR IMMEDIATE RELEASE
April 2, 1996
No. TR-21

CONTACT: (202) 225-1721

Crane Announces Hearing on the Department of Commerce Proposed Antidumping Regulations and Other Antidumping Issues

Congressman Philip M. Crane (R-IL), Chairman of the Subcommittee on Trade of the Committee on Ways and Means, today announced that the Subcommittee will hold a hearing on the Commerce Department's proposed substantive antidumping regulations and other issues concerning the administration of the antidumping law. **The hearing will take place on Tuesday, April 23, 1996, in the main Committee hearing room, 1100 Longworth House Office Building, beginning at 11:00 a.m.**

BACKGROUND:

The Uruguay Round Agreements Act, legislation to implement the Uruguay Round Agreements, went into effect on January 1, 1995. One important part of this legislation was a series of provisions greatly revising the U.S. antidumping statute in order to comply with U.S. obligations under the Uruguay Round Agreements. Antidumping occurs if: (1) a foreign producer sells a product in the United States for less than fair value, generally the price at which it is sold in the home market; and (2) the dumping injures or threatens injury to the U.S. industry producing the like product. Commerce conducts the first prong of this analysis, and the International Trade Commission investigates the second. On February 27, 1996, Commerce published proposed substantive regulations to implement the Uruguay Round Agreements Act (61 Fed. Reg. 7308). Commerce is seeking public comment by April 29, 1996.

On December 21, 1995, Chairman Crane introduced H.R. 2822, the "Temporary Duty Suspension Act," to provide Commerce the discretion to suspend antidumping duties temporarily if it determines that prevailing market conditions related to availability of the product in the United States make imposition of the duty inappropriate. On January 31, 1996, the Subcommittee requested written public comments on the legislation, due March 1, 1996.

In announcing the hearing, Chairman Crane stated: "The hearing will provide us a good opportunity to determine whether Commerce's proposed substantive antidumping regulations and its practice are in keeping with Commerce's statutory mandate. In addition, I am concerned with the impact that antidumping orders may have on U.S. companies that manufacture downstream products. Current U.S. trade laws simply do not provide adequate redress for American firms that need certain raw material to stay in business but cannot obtain them from U.S. producers. I hope that we can find a way to maintain the competitiveness of these companies without undermining the effectiveness of the antidumping laws."

FOCUS OF THE HEARING:

The primary focus of the hearing is to examine the proposed substantive antidumping regulations published by Commerce in order to assure that they are in conformity with the statutory mandate of the Uruguay Round Agreements. Secondly, the hearing will address H.R. 2822, the "Temporary Duty Suspension Act." H.R. 2822 will not be the primary focus of the hearing because the Subcommittee has already received written comments on the bill but will instead provide an opportunity to address the relationship between the antidumping law and U.S. downstream industrial users that may purchase merchandise that is subject to an antidumping order. Other antidumping issues will be addressed as time permits.

DETAILS FOR SUBMISSIONS OF REQUESTS TO BE HEARD:

Requests to be heard at the hearing must be made by telephone to Traci Altman or Bradley Schreiber at (202) 225-1721 no later than the close of business, Friday, April 12, 1996. The telephone request should be followed by a formal written request to Phillip D. Moseley, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. The staff of the Subcommittee on Trade will notify by telephone those scheduled to appear as soon as possible after the filing deadline. Any questions concerning a scheduled appearance should be directed to the Subcommittee staff at (202) 225-6649.

In view of the limited time available to hear witnesses, the Subcommittee may not be able to accommodate all requests to be heard. Those persons and organizations not scheduled for an oral appearance are encouraged to submit written statements for the record of the hearing. All persons requesting to be heard, whether they are scheduled for oral testimony or not, will be notified as soon as possible after the filing deadline.

Witnesses scheduled to present oral testimony are required to summarize briefly their written statements in no more than five minutes. **THE FIVE-MINUTE RULE WILL BE STRICTLY ENFORCED.** The full written statement of each witness will be included in the printed record.

In order to assure the most productive use of the limited amount of time available to question witnesses, all witnesses scheduled to appear before the Subcommittee are required to submit 200 copies of their prepared statements for review by Members prior to the hearing. **Testimony should arrive at the Subcommittee on Trade office, room 1104 Longworth House Office Building, no later than noon on Friday, April 19, 1996.** Failure to do so may result in the witness being denied the opportunity to testify in person.

WRITTEN STATEMENTS IN LIEU OF PERSONAL APPEARANCE:

Persons or organizations wishing to submit a written statement for the printed record of the hearing should submit at least six (6) copies of their statement, with their address and date of hearing noted, by close of business, Tuesday, May 7, 1996, to Phillip D. Moseley, Chief of Staff, Committee on Ways and Means, U.S. House of Representatives, 1102 Longworth House Office Building, Washington, D.C. 20515. If those filing written statements wish to have their statements distributed to the press and interested public at the hearing, they may deliver 200 additional copies for this purpose to the Subcommittee on Trade office, room 1104 Longworth House Office Building, at least one hour before the hearing begins.

FORMATTING REQUIREMENTS:

Each statement presented for printing to the Committee by a witness, any written statement or exhibit submitted for the printed record or any written comments in response to a request for written comments must conform to the guidelines listed below. Any statement or exhibit not in compliance with these guidelines will not be printed, but will be maintained in the Committee files for review and use by the Committee.

1. All statements and any accompanying exhibits for printing must be typed in single space on legal-size paper and may not exceed a total of 10 pages including attachments.
2. Copies of whole documents submitted as exhibit material will not be accepted for printing. Instead, exhibit material should be referenced and quoted or paraphrased. All exhibit material not meeting these specifications will be maintained in the Committee files for review and use by the Committee.
3. A witness appearing at a public hearing, or submitting a statement for the record of a public hearing, or submitting written comments in response to a published request for comments by the Committee, must include on his statement or submission a list of all clients, persons, or organizations on whose behalf the witness appears.
4. A supplemental sheet must accompany each statement listing the name, full address, a telephone number where the witness or the designated representative may be reached and a topical outline or summary of the comments and recommendations in the full statement. This supplemental sheet will not be included in the printed record.

The above restrictions and limitations apply only to material being submitted for printing. Statements and exhibits or supplementary material submitted solely for distribution to the Members, the press and the public during the course of a public hearing may be submitted in other forms.

Chairman CRANE. Folks, first of all, I have some opening remarks to make and our Ranking Minority Member, Mr. Rangel, is on his way. He got delayed because of a meeting in his office. But my opening statement is such that I want to make sure I get it all on the record, and I don't want to delay us any further. So welcome to this hearing of the Subcommittee on Trade concerning the proposed Commerce antidumping regulations and other antidumping issues.

The primary focus of this hearing is to address the proposed substantive antidumping regulations published by the Commerce Department in order to ensure they are in conformity with the statutory mandate of the Uruguay Round Agreements.

Second, this hearing will address H.R. 2822, the Temporary Duty Suspension Act legislation, that I introduced in December, which will provide an opportunity to address the relationship between the antidumping law and the U.S. downstream industrial users that may purchase merchandise that is subject to an order.

At the outset, I would like to congratulate the Commerce Department for its outstanding work in producing the proposed regulations we are examining today. I believe the regulations go a long way in increasing transparency in antidumping proceedings, which will benefit all parties involved in these disputes. These proposals provide considerable guidance concerning how Commerce intends to implement its statutory mandate given to it by Congress, which is necessary to ensure predictability and certainty for all businesses affected.

I believe it is important to focus our attention on these proposed regulations in order to make sure we do not undermine the effectiveness of the antidumping laws. We must continue to support U.S. industries that have been unfairly injured by dumping. At the same time, we must ensure the regulations do not go too far in the opposite direction. To do so would encourage our trading partners to adopt mirror legislation that would then be used against U.S. companies seeking to export.

In addition, unfairly or unjustifiably high dumping margins penalize U.S. companies and consumers that purchase products subject to dumping orders. Clearly, we need to enforce margins sufficient to offset the amount of dumping. However, we should not put in place mechanisms that will ensure dumping margins are excessive or unfair. That would be counterproductive. I have a few concerns regarding the proposed regulations, and I will address these issues as we question the witnesses. Let me say now, however, I am greatly concerned about the proposal to deduct from the export price any countervailing duties paid on behalf of the importer or reimbursed to the importer by the producer or exporter, resulting in the double counting of such duties and higher trade-inhibiting margins. The statute does not permit such a deduction, and there is no legislative history in which this Subcommittee agreed that such a drastic change in Commerce practice should be made. In fact, I am concerned this provision violates the WTO Agreement. I urge the Department to drop this provision and revert to its current practice.

I also urge Commerce to give as much guidance as possible in defining terms throughout the regulations. I realize a number of

these issues must be determined on a case-by-case basis but providing as much detail as possible in advance will lend predictability and transparency to the proceedings.

Finally, I congratulate the Department in establishing guidelines for the consideration of the views of downstream users and consumer organizations in its determinations. These parties often have very relevant information, and I am glad to see Commerce will address the points they make.

The mention of downstream users brings me to the issue of temporary duty suspension. As you know, I recently introduced legislation that would give authority to Commerce to suspend the imposition of antidumping or countervailing duties temporarily on a limited quantity of a particular product needed by the American industry when users are effectively unable to obtain that product from U.S. producers. Under current laws, antidumping and countervailing duties are imposed on all covered products, even when there is no domestic production. However, imposing such duties on products that cannot be obtained in the United States hurts U.S. manufacturers who must compete globally, but does not reduce injury to any U.S. industry.

Current U.S. trade laws simply do not provide adequate redress for American firms that need products subject to orders but cannot obtain them from U.S. producers. Present Commerce and ITC procedures are operative only in situations in which domestic producers have no intention of ever producing a particular product. I know a few of my colleagues do not support my bill. Let me assure them now I am more than willing to work with them to develop a better bill to solve the problem faced by our U.S. companies that source globally and manufacture here in the United States.

At the same time, I recognize we cannot undermine our antidumping laws. I would be delighted to put specific conditions in the language to address some of the concerns raised to assure the provision is as limited in effect as I intend. It is not my intent, for example, to permit the temporary suspension of duties in circumstances in which the respondent has been so successful at dumping that the U.S. industry has been driven out of business and can no longer supply the product in question. Nor do I intend to permit a temporary duty suspension if the product is available from U.S. producers that have prices that are merely higher than the price for the imported product, unless the price is so prohibitively high it is effectively unavailable.

In addition, I want to work with the Commerce Department to develop a way to solve this problem that is administratively workable. Let us be creative. We need to solve this problem. Dumping is no longer a domestic versus foreign issue. Instead, in the United States there are U.S. companies who need strong dumping laws, but, also, there are U.S. companies that may be adversely affected by these laws in certain situations. Let's work together to help all U.S. companies.

I now recognize my distinguished Ranking Member, Mr. Rangel, for any statement he would like to make.

[The opening statement follows:]

OPENING STATEMENT OF HON. PHIL CRANE

Good morning. Welcome to this hearing of the Subcommittee on Trade concerning the proposed Commerce antidumping regulations and other antidumping issues.

The primary focus of this hearing is to address the proposed substantive antidumping regulations published by the Commerce Department in order to assure that they are in conformity with the statutory mandate of the Uruguay Round Agreements. Secondly, this hearing will address H.R. 2822, the Temporary Duty Suspension Act, legislation that I introduced in December, which will provide an opportunity to address the relationship between the antidumping law and U.S. downstream industrial users that may purchase merchandise that is subject to an order.

At the outset, I would like to congratulate the Commerce Department for its outstanding work in producing the proposed regulations that we are examining today. I believe that the regulations go a long way to increasing transparency in antidumping proceedings, which will benefit all parties involved in these disputes. These proposals provide considerable guidance concerning how Commerce intends to implement its statutory mandate given to it by Congress, which is necessary to assure predictability and certainty for all businesses affected.

I believe that it is important to focus our attention on these proposed regulations in order to make sure that we do not undermine the effectiveness of the antidumping laws. We must continue to support our U.S. industries that have been unfairly injured by dumping. At the same time, we must assure that the regulations do not go too far in the opposite direction. To do so would encourage our trading partners to adopt mirror legislation that would then be used against U.S. companies seeking to export. In addition, unfairly or unjustifiably high dumping margins penalize U.S. companies and consumers that purchase product subject to dumping orders. Clearly, we need to enforce margins sufficient to offset the amount of dumping. However, we should not put in place mechanisms that will assure that dumping margins are excessive or unfair. That would be counterproductive.

I have a few concerns regarding the proposed regulations, and I will address these issues as we question the witnesses. Let me say now, however, that I am greatly concerned about the proposal to deduct from export price any countervailing duties paid on behalf of the importer or reimbursed to the importer by the producer or exporter, resulting in the double-counting of such duties and higher, trade-inhibiting margins. The statute does not permit such a deduction, and there is no legislative history in which this Committee agreed that such a drastic change in Commerce practice should be made. In fact, I am concerned that this provision violates the WTO agreement. I urge the Department to drop this provision and revert to its current practice.

I also urge Commerce to give as much guidance as possible in defining terms throughout the regulations. I realize that a number of these issues must be determined on a case-by-case basis, but providing as much detail in advance will lend predictability and transparency to the proceedings.

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Under current laws, antidumping and countervailing duties are imposed on all covered products, even where there is no domestic production. However, imposing such duties on products that cannot be obtained in the United States hurts U.S. manufacturers who must compete globally, but does not reduce injury to any U.S. industry. Current U.S. trade laws simply do not provide adequate redress for American firms that need products subject to orders but cannot obtain them from U.S. producers. Present Commerce and ITC procedures are operative only in situations in which domestic producers have no intention of ever producing a particular product.

I know that a few of my colleagues do not support my bill. Let me assure them now that I am more than willing to work with them to develop a better bill to solve the problem faced by our U.S. companies that source globally and manufacture here in the United States. At the same time, I recognize that we cannot undermine our antidumping laws. I would be delighted to put specific conditions in the language to address some of the concerns that have been raised -- to assure that the provision is as limited in effect as I intend. It is not my intent, for example, to permit the temporary suspension of duties in circumstances in which the respondent has been so successful at dumping that the U.S. industry has been driven out of business and can no longer supply the product in question. Nor do I intend to permit a temporary duty suspension if the product is available from U.S. producers but at prices that are merely higher than the price for the imported product, unless the price is so prohibitively high that it is effectively unavailable.

In addition, I want to work with Commerce to develop a way to solve this problem that is administratively workable. Let us be creative. We need to solve this problem. Dumping is no longer a domestic versus foreign issue. Instead, in the United States, there are U.S. companies who need strong dumping laws but also there are U.S. companies that may be adversely affected by these laws in certain situations. Let us work together to help all U.S. companies.

I now recognize our distinguished Ranking Member, Mr. Rangel, for any statement that he would like to make.

Today, we will hear from a number of distinguished witnesses. In the interest of time, I ask that you keep your oral testimony to five minutes. Of course, we would be happy to include longer, written statements in the record.

Mr. RANGEL. Thank you, Mr. Chairman.

Mr. Chairman, as you well know, no area of the U.S. trade law is more complex or contentious than antidumping. Congress has written and rewritten U.S. antidumping laws on various occasions since the original dumping statute was passed some 80 years ago. The process always proves to be controversial, as was the case when the Congress substantially rewrote the U.S. antidumping laws in 1995 in order to implement the results of the Uruguay round.

The legislative process in 1994 was long, difficult, and hard fought, and a positive outcome was only possible as a result of compromise on all sides. Therefore, I sincerely hope we can avoid re-opening controversial issues that were settled in 1994 during the debate of the Uruguay round implementing legislation.

At the same time, I recognize this Trade Subcommittee has a legitimate oversight role in ensuring the Commerce Department, which administers the antidumping laws, is faithfully implementing the provisions of the new law.

I look forward to hearing from Sue Esserman, Assistant Secretary for Import Administration at Commerce, and our other witnesses concerning the Department's proposed regulation to implement the new law. Sue and her colleagues worked closely with this Subcommittee on implementing legislation in 1994 and will undoubtedly continue to listen to and work closely with all Members of the Subcommittee on the proposed regulations.

I would like to commend the Commerce Department for the approach it has taken in developing these proposed legislations. As I understand it, before Commerce drafted the proposed regulations, the public was given an opportunity not only to offer opinions on any topic, but, also, to respond to other parties' opinions. When the proposed regulations were issued in February of this year, they addressed every comment submitted, more than 1,500 in total. The public now has until May 15 to comment on the proposed regulations and Commerce will hold a public hearing in early June. I cannot imagine a more thorough, open, or fairer process.

I would also like to commend the recently announced organizational improvements at the Import Administration. Despite the increased responsibility engendered by the Uruguay round legislation, the Import Administration's budget has been reduced. This necessitated a hard look by the Import Administration at how it does business. The new restructure will make Import Administration a more efficient operation without detracting from its ability to enforce the law.

Mr. Chairman, American jobs and economic growth depend on fair trade at home as well as expanded markets abroad. In these times of tough global competition, we must ensure the United States maintains the necessary tools to ensure the U.S. companies and U.S. workers have a remedy against unfairly traded foreign imports. I know Members on both sides of the aisle agree that strong antidumping laws are our primary defense against unfair trading by foreign firms. Indeed, Chairman Archer reiterated this view in his November 15, 1995, letter to a number of Ways and Means Members, a letter in which he also stated his support for

a very limited expectation to the antidumping and countervailing duty laws to solve specific short supply problems.

This leads me to my final introductory comment regarding H.R. 2822, which is the secondary subject of this hearing. As you know, during the markup of the Uruguay round legislation in 1994, I and most of my colleagues on the Democratic side of the aisle voted against the provision that would have created a so-called short supply exception. We opposed this legislation because it would have rewarded foreign firms for dumping and driving U.S. competitors out of business. And we reiterated our position in a letter to you and to Chairman Archer last fall.

As I understand it, existing law and administrative procedures take into account the interest of users and customers to provide ways of dealing with legitimate short-term, short supply situations. I recognize there will be witnesses here today testifying in favor of H.R. 2822, but they face a considerable burden in persuading many Members of this Subcommittee and the administration why additional legislation is needed in this area and how it can be drafted to avoid undermining a strong, enforceable antidumping law in this country.

Thank you, Mr. Chairman.

Chairman CRANE. Thank you. And I would like to yield now to Mr. Thomas for a brief opening remark.

Mr. THOMAS. Just very briefly I ask unanimous consent that my written statement be made a part of the record.

[The opening statement follows:]

STATEMENT OF THE HON. BILL THOMAS
Subcommittee on Trade
April 23, 1996

Mr. Chairman, I appreciate this opportunity to comment on "short supply" legislation. It has been an extremely controversial subject in my district.

We should consider developing a relief mechanism under the dumping law that prevents foreign industries from being able to kill two American industries at once by undermining domestic manufacturers of a fundamental input. That is why I supported a proposed amendment to the World Trade Organization implementing bill in 1994.

The difficulty I have with the proposal advanced by some advocating a "short supply" exception lies in its breadth. The language they prefer gives Commerce immense discretion in deciding when to suspend duties. The language would conceivably permit duties to be suspended in situations other than those in which domestic supplies are limited. Commerce could just as easily determine suspension is appropriate because prices change--more or less the whole point of a dumping order.

Experience teaches that the only way to solve any problem is to begin by properly defining what is needed. I hope the witnesses will take advantage of this opportunity to explain their cases on the record for the Subcommittee's benefit.

Mr. THOMAS. But, Mr. Chairman, I am pleased you clarified in your opening remarks that we are not focusing on developing a provision which would allow suspension for American firms who, as you said, need products subject to order, but cannot obtain them from the U.S. producers at the price they desire. It will not be for that reason.

And then, finally, if you are dealing with shortage manipulation, I would have to tell Members of the Subcommittee that, coming from an area that deals heavily in produce, and you are dealing with planting and harvesting, the timing of shortage is critical. What works for steel may not work for pistachios and garlic and other products that have growing seasons.

Thank you, Mr. Chairman.

Chairman CRANE. I know Mr. Matsui would like to make an opening remark.

Mr. Gibbons, do you?

Mr. Matsui.

Mr. MATSUI. Thank you, Mr. Chairman.

First of all, I would like to thank you for calling these hearings. I think they do serve a valuable purpose, and we all appreciate it very much and, of course, I would like to congratulate the Commerce Department, Sue Esserman in particular, for her deliberative approach in putting out these proposed regulations. I think all of the industry groups, all people that have an interest in the antidumping legislation, certainly have had an adequate opportunity to vent their concerns before the Commerce Department. As a result of that, I am reasonably satisfied the process has been expeditious and fair.

I would, also, like to reiterate what the Ranking Member, Mr. Rangel, has said. In 1993 and 1994, particularly, in 1994, when we began the implementing legislation on the Uruguay round, the issue of the antidumping legislation was probably the most contentious part of putting that legislation together. We had assistance, obviously, from the Commerce Department, USTR, the Council of Economic Advisors, and certainly, Members on both sides of the aisle, Democrats and Republicans. In fact, it was Mr. Houghton and Mr. Levin who led the effort on the antidumping legislation with respect to short supply, among other issues. And we were able to arrive at a very fragile compromise through the process of negotiations, and it is my belief that, had any provision in the legislation, particularly the antidumping part of the legislation, been changed, it might have upset that fragile compromise. And I believe after the November election, when we received over 300 votes in favor of the Uruguay round, it was because, partly, that fragile compromise stayed together and, as the Chair and other Members of this Subcommittee know, we did take a vote on the short supply issue. I believe the amendment to put the short supply in the legislation failed on a 23 to 15 vote. And many Members, when they discussed this issue publicly at markup, indicated the reason they were voting the way they did against putting short supply in the legislation was mainly to keep the compromise together. And it would be, in my opinion, at this moment premature to make changes in that legislation. I think sometime down the road, a few months, perhaps next year, we should look at the antidumping leg-

islation in total and, perhaps, at that time, the Subcommittee and others could come up with a comprehensive review and a comprehensive series of amendments on the antidumping legislation.

But to take out only one provision or to put in only one provision at this time, I think, would be somewhat of a breach of faith for those of us who worked on this legislation in 1994. And that is not to say changes ultimately should not be made because there probably should be some review and changes of the antidumping legislation. But, at this moment, before the regulations have become final and before we have been able to actually implement the regulations, in my opinion, it would be somewhat premature.

At this time, I would like to yield to Mr. Levin, who also has a comment to make.

Mr. LEVIN. Thank you, Mr. Chairman. I have an opening statement I would like to have inserted in the record.

Chairman CRANE. Without objection, so ordered.

[The opening statement follows:]

April 23, 1996

**STATEMENT BY CONGRESSMAN SANDER M. LEVIN
AT WAYS AND MEANS TRADE SUBCOMMITTEE HEARING
ON ANTIDUMPING LAWS**

The documents for this hearing indicate that "the primary focus is to examine the proposed substantive antidumping regulations published by the Commerce Department in order to assure that they are in conformity with the statutory mandate of the Uruguay Round Agreements" Act.

Clearly, it is appropriate to determine whether the regulations are in conformity with the Act. The implementing legislation for the Uruguay Round Agreements Act was a careful effort to ensure that U.S. trade laws remain strong. And it passed by wide bipartisan majorities in both Houses of Congress.

But it would be unwise to use an inquiry into the conformity of regulations with carefully worked-out legislation as a forum to try to undo that legislation.

Indeed, at a time when there is considerable downsizing within American industry, I would find it surprising and alarming that this hearing might be part of an effort to undermine laws that are critical to the retention of a strong industrial base.

Any effort to undermine our trade laws would clearly be opposed by the Clinton Administration and House Democrats. Indeed, I would be surprised if it were not also strongly opposed by the Majority Leader of the Senate.

Mr. LEVIN. Mr. Chairman, I would like to associate myself with the remarks of Mr. Rangel and Mr. Matsui. I think it is important to have a hearing on the regulation, and the documents you issued indicated that that was the primary purpose. I want to say I think it would be very unfortunate if an inquiry into the conformity of the regulations with the legislation were used as an opportunity to try to undo the legislation. As Mr. Matsui and Mr. Rangel indicated, we spent a lot of time—Mr. Houghton, and others, and myself—working on this issue, working out an agreement that would allow ratification of the Uruguay round on a broad bipartisan basis.

And I think, especially at this time of considerable downsizing within American industry, it would really be alarming if a hearing on regulations would be part of an effort to undermine laws that are critical to the retention of a strong industrial base in this country. I think such an effort would be, as indicated by my colleagues, opposed by House Democrats. I am sure it would be opposed by the Clinton administration, and I have a strong hunch it would also be opposed in the Senate, including by the Majority Leader of the Senate.

So I look forward to the hearing today. But I hope very much the focus will be: Are these regulations, that have been so carefully crafted, in conformity with the statutory mandate, which was also carefully worked out?

And thank you to my colleagues.

Mr. MATSUI. May I take my time back?

Mr. LEVIN. Yes.

Mr. MATSUI. I just have one further, very short comment to make.

I might also add that, in the negotiations that occurred, the short supply issue was the last issue to be resolved, and that indicated how critical that issue was to both sides. And that is why, to pull this issue out at this time and make changes on it, would really, in my opinion, break the agreement we had in 1994 because it was the most difficult issue to resolve. And, as a result of that, to make a change only in that provision now without reviewing the entire antidumping legislation before the regulations have been final would really, in my opinion, be inappropriate.

Thank you, Mr. Chairman.

Chairman CRANE. And, today, we are going to be hearing from a number of distinguished witnesses, and we have a long schedule. So, in the interest of time, I would ask that you try to keep your oral presentations to 5 minutes and, of course, we will be happy to include any longer written statements for the record.

Our first witnesses are two of our distinguished colleagues, Hon. Pete Visclosky from Indiana and Hon. Pete Peterson from Florida. Will the gentlemen please take the dais. You may proceed when ready.

STATEMENT OF HON. PETER J. VISCLOSKY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA

Mr. VISCLOSKY. Chairman, thank you very much. I appreciate the opportunity to testify today.

Chairman, our trade laws are especially important to the American steel industry, which has historically been victimized by unfair foreign trade. In the last round of steel cases, Korea was found to have injured our steel industry by subsidizing its high value steel products. And, today, the American industry is threatened by unfair trade from Russia and other Eastern European countries with their legacy of inefficient State-owned and run mills, dumping steel in foreign markets.

In implementing the Uruguay round, we must ensure we will be able to fully utilize our rights under the World Trade Organization to neutralize injurious dumping in our market.

Before I begin to address some of the issues regarding the Commerce Department's proposed regulations, I would like to highlight an important provision of the Uruguay round implementing legislation that was a top priority of mine and the United Steelworkers of America.

Section 131 of the act directed the President to seek, within GATT and the WTO, the establishment of a working party to examine the relationship of internationally recognized worker rights to GATT and WTO articles and to report to Congress on the progress made in establishing the working party.

Last month, in his 1995 Annual Report on the Trade Agreements Program, the President reported that, despite continued U.S. efforts, as yet there has not been the needed consensus, especially among developing countries, to pursue formally this issue on the WTO's agenda. Relative to the regulations proposed by the Commerce Department, while the steel industry is still preparing their formal comments, I believe the consensus among the industry is that the Commerce Department has done a very good job in attempting to make the necessary conforming changes to our existing antidumping regulations to implement the Uruguay Round Agreements Act.

Commerce has tried to achieve an appropriate balance between its ability to vigorously enforce our trade laws in an era of very limited resources and the burdens placed on petitioners to initiate cases and participate meaningfully in the investigative process.

However, I would like to highlight specifically three areas. First, and you had mentioned it in your opening remarks, Mr. Chairman, is reimbursement of duties. Some segments of the U.S. steel industry have complained to me that under current law, dumping orders are only partially effective because of the absorption of antidumping duties by importers, particularly those related to foreign producers covered by orders.

The Commerce Department's proposed regulations for addressing reimbursement are an improvement over existing regulations from my point of view.

Second, on affiliated parties. The Commerce Department has gone a long way in implementing congressional intent by expanding the definition of so-called "affiliated parties." This proposed change, which is designed to target groups that exist in countries

such as Japan and Korea, with close supplier relationships, franchises, and joint ventures, does not go far enough.

And, finally, on timetables. Another concern that was raised to me, with respect to the Commerce Department's proposed regulations, pertains to the general timetables for making allegations. It has been suggested that the timetables be lengthened.

In conclusion, Mr. Chairman, I caution those who would like to use the regulatory process as an opportunity to go beyond what is required by the Uruguay round. Mr. Chairman, I urge you to reject those pleas. We must do everything within our power to protect and preserve the full force of our trade laws against a multitude of foreign interests who would like nothing better than to exploit the openness of our markets.

Mr. Chairman, again, I thank you very much for the opportunity to be able to testify.

[The prepared statement follows:]

**STATEMENT OF HON. PETER J. VISCLOSKEY
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF INDIANA**

Good morning, Mr. Chairman. I appreciate the opportunity to appear before you and the other Trade Subcommittee members as you hear testimony from a variety of groups regarding the Commerce Department's proposed regulations to conform our trade laws with the statutory mandate of the Uruguay Round Agreement and other issues concerning the administration of our trade laws. Without objection, Mr. Chairman, I would like to briefly summarize my remarks and have my entire written statement entered into the hearing record.

I firmly believe that the full force of our trade laws must remain available to all domestic industries and workers who stand to be injured by dumping. Administration of the trade laws should encourage compliance and deter circumvention and avoidance. It is essential that relief be available as soon as possible, since the timely granting of relief benefits domestic producers, workers, and communities. Even users of dumped products benefit from swift and vigorous enforcement of our trade laws when disruption of supply is minimized.

Our trade laws are especially important to steel, which has historically been victimized by unfair foreign trade. Steel production is very capital intensive, and many foreign governments own or heavily subsidize their industries. In the last round of steel cases, Korea was found to have injured our steel industry by subsidizing its high value steel products. Today, the American steel industry is threatened by unfair trade from Russia and other Eastern European countries, with their legacy of inefficient state-owned and -run mills dumping steel in foreign markets. Unfair foreign trade costs us jobs!

In implementing the Uruguay Round Agreement, we must ensure that we will be able to fully utilize our rights under the World Trade Organization (WTO) to neutralize injurious dumping in our market. Even though some might argue that the Uruguay Round represents a net weakening of our trade laws, our negotiators worked tirelessly to secure a reasonable antidumping agreement. It is incumbent upon us to vigorously enforce the agreement through our trade laws and resist efforts to weaken it through implementing regulations.

The success story of the American steel industry and its workers:

As the U.S. Representative of the largest steel-producing district in the country and an officer of the Congressional Steel Caucus, my comments today will be focused primarily on how the Commerce Department's proposed regulations would impact the American steel industry and its workers. I have seen first-hand how our antidumping (AD) and countervailing duty (CVD) statutes have been crucial tools in preventing unfair, foreign trade in steel. By leveling the playing field against dumped and subsidized imports, our trade laws have allowed our steel industry to compete and win in the global steel market.

Today's American steel industry is worldclass and highly competitive. Since 1980, our steel industry has invested over \$35 billion in capital improvements, which has transformed the American steel industry into the high-quality, low-cost producer for the domestic market. U.S. Steel's Gary Works, the nation's largest steel mill, located on the southern shore of Lake Michigan in Northwest Indiana, has invested \$1.5 billion in new plant and equipment over the past decade.

Since 1983, U.S. steelworkers' productivity has increased faster than any of our major competitors. Today, American integrated steelworkers are the most productive in the world, using an average of 4.42 hours of labor to produce a ton of steel. At U.S. Steel's Gary Works, it can take as few as 2 hours of labor to produce a ton of steel. Indeed, our steelworkers are more efficient than their counterparts in Japan or Germany. This remarkable performance is particularly impressive in light of increasingly stringent U.S. environmental regulations with which the American steel industry is complying.

However, these remarkable productivity gains did not come without enormous human costs. Since 1980, over 250,000 American steelworkers have permanently lost their jobs. An estimated 170,000 workers are currently employed in the steel industry. In 1975, U.S. Steel's Gary Works employed 24,000 workers; last year, employment had shrunk to 7,800 workers. But even with a two-thirds reduction in its workforce, Gary Works produced 7.16 million tons of steel -- an increase of over 22% compared to the 5.84 million tons produced in 1975.

Worker rights:

Before I begin to address some of the issues regarding the Commerce Department's proposed regulations, I would like to highlight an important provision in the Uruguay Round implementing legislation that was a top priority of mine and the United Steelworkers of America (USWA). Section 131 of the Uruguay Round Agreements Act directed the President to seek in the General Agreement on Tariffs and Trade (GATT) and the WTO the establishment of a working party to examine the relationship of internationally recognized worker rights to GATT and WTO articles and to report to Congress on the progress made in establishing the Working Party and on the four U.S. objectives for the Working Party.

The objectives are to: (1) explore the linkage between international trade and internationally-recognized worker rights, taking into account differences in the level of development among countries; (2) examine the effects on international trade of the systematic denial of such rights; (3) consider ways to address such effects; and (4) develop methods to coordinate the work program of the working party with the International Labor Organization.

Last month, in his 1995 Annual Report on the Trade Agreements Program, the President reported that despite continued U.S. efforts, there as yet has not been the needed consensus, especially among developing countries, to pursue formally this issue on the WTO's agenda. I have been assured by the U.S. Trade Representative that our trade negotiators have been working diligently to forge a consensus on this issue, and that the United States will continue its efforts to build the needed consensus to establish the Working Party mandated in the Uruguay Round Agreements Act (URAA).

Mr. Chairman, I urge you and the other subcommittee members to work with the Administration to ensure that this goal is achieved. We have an opportunity to press for a working party on worker rights at the WTO Ministerial Conference in Singapore, December 9-13, 1996. Since one of the goals in Singapore will be to agree upon additional, new work program issues for the WTO, it is my sincere hope that every effort will be made to reach a consensus on how to move forward with the implementation of a working party on worker rights. In addition, I am hopeful that progress on worker rights will be made in other arenas, including the Organization for Economic Cooperation and Development and the International Labor Organization, so that there will be some positive movement towards consensus heading up to the WTO Ministerial Conference in December.

Regulations proposed by the Commerce Department:

Now, I would like to highlight several, specific issues that have been brought to my attention by various segments of the U.S. steel industry regarding the complicated and extensive proposed regulations issued by the Commerce Department on February 27, 1996. First, I would like to commend Ms. Susan G. Esserman, Assistant Secretary for Import Administration, and her staff for bending over backwards to solicit private sector views before issuing the proposed regulations.

Over 1,500 preliminary comments from 80 different sources were received between January and June of last year. Last week, the formal comment period was extended until May 15, and it is my understanding that no final comments have been received to date. Given this situation, I canvassed representatives from various segments of the steel industry to develop the following composite of how the proposed regulations would impact steel.

Although they are still preparing their formal comments, the consensus in the steel industry is that the Commerce Department has done a very good job in attempting to make the necessary conforming changes to our existing AD regulations to implement the URAA. Commerce has strived to achieve an appropriate balance between its ability to vigorously enforce our trade laws in an era of very limited resources and the burdens placed on petitioners to initiate cases or participate meaningfully in the investigative process. However, the devil is in the details, and I would like to emphasize how absolutely essential the careful implementation of these changes is to the steel industry and other sectors of our economy.

Reimbursement of duties:

Some segments of the U.S. steel industry have complained that under current law dumping orders are only partially effective because of the absorption of antidumping duties by importers, particularly those related to foreign producers covered by orders. They allege that, over time, duty absorption is covered by reimbursement of the parent organization. However, over the years, there have been very few cases where reimbursement has been proved, even in cases where double digit dumping margins have been found over long periods of time.

The Commerce Department's proposed regulations for addressing reimbursement are an improvement over existing regulations. The Statement of Administrative Action regarding the deduction of reimbursed countervailing duties from the U.S. price in antidumping cases would greatly improve the ability of U.S. manufacturers to compete after the imposition of duties on unfairly traded products. In addition, this provision would not double count any duties or violate any trade obligations.

For example, assume a foreign steel producer receives a 10% export subsidy on a ton of steel and is subject to a 10% countervailing duty. It is also subject to a 10% antidumping duty because its home market selling price is \$550 per ton and the U.S. -- now "export" -- price is \$500 per ton.

Now assume the foreign steel company reimburses the importer for the \$50 export subsidy. Under current practice -- without the proposed new regulation -- this is what happens. The Commerce Department increases the export price by the \$50 export subsidy to avoid double counting. There are no dumping duties collected and the importer has paid no duties because they were reimbursed the CVD duty of \$50.

Under the proposed new regulation, the Commerce Department would subtract from the U.S. price any CVD duties that have been reimbursed. Thus, the foreign exporter pays the \$50 in countervailing duties that were reimbursed to the importer. The importer pays the dumping duties to reflect the \$50 of dumping that occurred when the product had a total cost of only \$500, since it paid no duties out of pocket and there was a foreign value of \$550.

The proposed new regulation will be consistent with the current antidumping law and regulations on reimbursement of duties. We can take the same antidumping duty scenario, but this time assume there is no companion CVD order. If the foreign steel producer reimburses \$50 in dumping duties to the importer, then the Commerce Department determines that a total of \$100 in dumping duties is owed because the \$50 reimbursed in dumping duties is added to the duties owed.

Foreign steel producers and importers may object to this provision. However, the proposed regulations will merely make clear that the statute does not permit them to evade payment of antidumping duties when foreign producers reimburse countervailing duties.

Affiliated Parties:

In a related matter, the Commerce Department has gone a long way in implementing congressional intent by expanding the definition of so-called "affiliated parties." This proposed change -- which is designed to target groups, like Japanese keiretsu and Korean chaebols, with close supplier relationships, franchises, and joint ventures -- does not go far enough. In fact, under the Commerce Department's proposed regulations, the Department does not sufficiently emphasize the ability to exercise control over affiliated parties. Moreover, Commerce has rejected the existence of temporary market power as sufficient to demonstrate the existence of control. I would hope that the Department will further expand the definition of affiliated parties in its final regulations.

Timetables:

Another concern that was raised with respect to the Commerce Department's proposed regulations pertains to the general timetables for making allegations. For example, in investigating countrywide sales below cost allegations, targeted dumping allegations, and duty absorption reviews, the timetables are compressed to such a degree that there will not be enough time to fully explore all of these issues. It has been suggested that the timetables be lengthened from the 20-30 days put forth by Commerce in its proposed regulations by at least another 30 days in the final regulations.

Conclusion:

The complexity of the Commerce Department's proposed regulations is truly mind boggling. There is an army of trade lawyers, representing both domestic and foreign interests, working feverishly to analyze and comment on the proposed regulations by the May 15 deadline. In conclusion, I would caution those who would like to use the regulatory process as an opportunity to go beyond what is required by the Uruguay Round Agreements Act. Indeed, I am sure you will hear from certain groups later today, that would propose to gut our trade laws by inserting proposals, including an overly-broad short supply provision, that were rejected by our trade negotiators during the arduous Uruguay Round negotiations.

Mr. Chairman, I would urge you to reject these salacious pleas. We must do everything within our power to protect and preserve the full force of our trade laws against the multitude of foreign interests who would like nothing better than to exploit the openness of our market. Thank you.

Chairman CRANE. Thank you.
 Congressman Peterson.

**STATEMENT OF HON. PETE PETERSON, A REPRESENTATIVE
 IN CONGRESS FROM THE STATE OF FLORIDA**

Mr. PETERSON. Thank you, Mr. Chairman, for allowing me to appear before the Subcommittee today and discuss this important trade issue.

I understand its timeliness, and I know how sensitive it is. But let me begin clearly by stating I am an enthusiastic cosponsor of H.R. 2822 and strongly support its prompt enactment.

Because there has been some confusion about exactly what this legislation does and does not do, I would like to take a moment to explain the bill.

This bill gives the Secretary of Commerce the authority—the authority—but not the obligation to grant temporary—and I emphasize temporary—exclusion from antidumping and countervailing duties in appropriate cases. The bill ensures full due process for all participating parties before any action is taken and caps relief time at 1 year. The Department could also limit relief to certain specific product specifications, limit the time, the quantity of relief, and restrict relief for specific companies that have a clearly demonstrated need.

I do not believe the temporary—emphasize temporary—duty relief suspension provision would make the trade laws any more difficult to enforce. We want and need strong and effective trade laws. However, these laws should clearly protect our domestic industry. If American industry can supply products subject to specific limitations contained in this legislation, no exemption would be made temporary or otherwise from the requirement to pay applicable antidumping or countervailing duties. But if domestic industry cannot supply a particular product the American companies need, only our foreign competitors are helped by imposing antidumping and countervailing duties on those imports.

Why am I interested in this issue? Let me give the Subcommittee one example of the impact of current law on an American business. Berg Steel Pipe Corp. is based in my district in Panama City, Florida. As part of their basic production process, Berg Steel Pipe needs a high-quality steelplate to make large diameter line pipe. The steelplates they need come in sizes and specifications they simply cannot get from U.S. suppliers. Yet, when they import this product, they often must turn to suppliers that are subject to antidumping and countervailing duties. Passage of H.R. 2822 would provide an equitable solution to this problem.

Mr. Chairman, I understand and realize this is not a flawless bill. However, we cannot continue to ignore this issue under the guise of supporting American industry through enforcement of existing law. Existing law is unsatisfactory with regard to the problem I have described. H.R. 2822 is much narrower in scope than similar bills introduced in previous Congresses. This legislation applies to a very narrow segment of U.S. trade operations and corrects the problem for industries using specialized materials in their manufactured product. It simply makes sense to correct the problem.

Again, I thank you for allowing me to testify, and I would be happy to take any questions you might have.

[The prepared statement follows:]

STATEMENT OF HON. PETE PETERSON
A REPRESENTATIVE IN CONGRESS FROM THE STATE OF FLORIDA

Thank you, Mr. Chairman, for allowing me to appear before the Subcommittee today to discuss this important issue.

Let me begin by clearly stating that I am a cosponsor of H.R. 2822, and strongly support its prompt enactment. Because there has been some confusion about what exactly this legislation does and does not do, I would like to take a moment to explain the bill.

This bill gives the Secretary of Commerce the authority, but not the obligation, to grant temporary exclusions from antidumping and countervailing duties in appropriate cases. The bill ensures full due process for all participating parties before any action is taken, and caps relief time at one year. The Department could limit relief to certain specific product specifications, limit the time and quantity for relief, and restrict relief to specific companies that have a clearly demonstrated need.

I do not believe a temporary duty relief suspension provision would make the trade laws more difficult to enforce. We want and need strong and effective trade laws. However, these laws should protect domestic industries that establish dumping or subsidies. If American industry can supply products subject to these determinations, there should be no exemption, temporary or otherwise, from the requirement to pay applicable antidumping or countervailing duties. But, if domestic industry does not make particular products American companies need, only our foreign competitors are helped by imposing antidumping and countervailing duties on imports.

Why am I interested in this issue? Let me give the subcommittee one example of the impact of current law on an American business. Berg Steel Pipe Corporation is based in my district in Panama City, Florida. As part of their basic production process, Berg Steel Pipe needs high quality steel plate to make large diameter line pipe. There are sizes and specifications they simply cannot get in the United States. Yet, when they import, they often must turn to suppliers that are subject to antidumping and countervailing duties. Passage of legislation similar to H.R. 2822 would provide an equitable solution to this problem.

Mr. Chairman, I realize this is not a flawless bill. However, we cannot continue to ignore this issue under the guise of supporting American industry through enforcement of existing law. Existing law is unsatisfactory with regard to the problem I have described. If the language of H.R. 2822 is broader than necessary to achieve the desired result, I am willing to discuss how the legislative language could be modified. However, I stand firm on my desire to see this problem decisively addressed.

Again, thank you for allowing me to testify. I would be happy to field any questions at this time.

Chairman CRANE. Thank you.

Mr. Rangel.

Mr. RANGEL. No questions.

Chairman CRANE. Mr. Thomas.

Mr. THOMAS. Just very briefly, I want to thank both of you for participating.

Pete, your written testimony outlines, I think, the problem some of us have with the legislation. If it followed your problem of the pipe company, and that is they simply cannot get the product, that is, if the legislation said it is unavailable, then I don't think you would find too much controversy in terms of making this kind of a provision available to any administration. The problem is it doesn't say that. The legislation would allow action if it were too long a wait for the product, and there is no ability to determine that within the year's time. The legislation would allow it if the product were too high priced versus the other product that you could get. The legislation doesn't deal with that.

In addition, I mentioned agricultural produce. Coming from Florida, there may be some folks in your delegation that might be somewhat concerned about what could be an attempt to blow out domestic producers in between harvest seasons, given the way in which you have complimentary seasonality around the world and a product could be delivered when it is in season in another area and not in season here. In fact, that cheap product was brought in, and it had some degree of durability on the marketplace, like garlic or other types of products—I mentioned pistachios—you could clearly affect, especially in a product like garlic, the planting season to follow shortly and, therefore, the subsequent harvest, which may or may not be based upon whether or not there was a price available in the marketplace at a certain time.

If your example was the universe of the problems we faced, there would be no controversy. If you can't get it, it is unavailable, it is not a problem. The problem comes in when it is too long a wait, it is too high a price, or the period at which you are complaining is not the appropriate one, and that is why I think it is fairly difficult for us to write legislation to fit the circumstances. That is my problem, and I think it is a problem of other Members on the Subcommittee. We aren't opposed to the solution of unavailable.

Mr. PETERSON. If I may, I understand where you are coming from, and I think it makes a lot of sense to be as specific as we can be. And I can't speak for the Chairman and the author of H.R. 2822, but I think in his opening remarks he did refer to willingness to address the specific language and to actually go back and perhaps narrow it even further, if necessary. But this is the kind of thing we have got to find a solution to. And, while I understand timeliness is a problem, I understand there are some other aspects of it that need to be looked at. We have industries out here who are, in fact, being placed in a position of noncompetitiveness because of our own procedures.

Mr. THOMAS. And I understand that, and the Chairman has been gracious. We are going forward in trying to search out language that will, in fact, do what we want it to do and no more, and that is part of the difficulty. It isn't that we are in disagreement. It is just that we haven't come to agreement.

I want to thank both of you. I appreciate your comments.

Mr. VISCLOSKY. Mr. Thomas, if I might, I did not address the issue in my oral testimony, but referred to it in writing as well, and would simply point out the reason that you have an order in place is because injury was found, and it is certainly my impression there is an existing regime and current law to provide for remedies in situations voiced by Mr. Peterson. With all due respect to the gentleman, my concern is that, in some of these very particular instances, there are no suppliers left because they have been run out of business because of unfair trade.

Mr. THOMAS. Thank you.

Chairman CRANE. Mr. Gibbons.

Ms. Dunn.

Mr. Matsui.

Mr. Levin.

I thank our panelists for their input and, hopefully, we can look forward to working cooperatively with you to reach accommodations for all of the concerns presented thus far.

Thank you, gentlemen.

Mr. VISCLOSKY. Thank you, Mr. Chairman.

Mr. PETERSON. Thank you, Mr. Chairman.

Chairman CRANE. Our next witness is Hon. Susan G. Esserman, Assistant Secretary for Import Administration at the Commerce Department.

Secretary Esserman, before you begin, I would like to express my heartfelt distress over the loss of Secretary Ron Brown, which I know is shared by all of our Subcommittee Members. I know they share that because he contributed a great deal in the trade policy arena, and he will be greatly missed. And I look forward to continuing to work with now Secretary Kantor as he assumes the helm of the Commerce Department.

Secretary Esserman, I want to congratulate you on a tremendous effort in drafting the proposed regulations. As you sift through the various comments you receive on the regulations, I ask that you keep me and my staff well informed of your intentions in developing final regulations. As you know, it is vital for the Subcommittee to be an integral part of the regulatory process. As you are making your final decisions as to the content of the final regulations, we will share our concerns about how the statute should be interpreted and address any issues as to our intent in formulating the statute last year.

Now, I am mindful of not inhibiting the regulatory process and have no desire to somehow influence inappropriately the Department's decisionmaking. However, we are tasked, through our oversight obligations, with assuring the statute which we passed is being appropriately interpreted and implemented. Our role does not end in passing a statute. After all, the regulations are the vehicle that give life to the statute and will form the basis of the agency's administration of that statute.

We look forward to continuing our work together, and we look forward to your testimony.

**STATEMENT OF HON. SUSAN G. ESSERMAN, ASSISTANT
SECRETARY OF COMMERCE FOR IMPORT ADMINISTRATION,
U.S. DEPARTMENT OF COMMERCE**

Ms. ESSERMAN. Thank you very much, Chairman Crane, for inviting me to testify today before the Subcommittee. I want to thank you very much for your comments about Secretary Brown. He was a great leader and Secretary and an extraordinary man. We will miss the Secretary and our fallen colleagues, but we do look forward to working with our new Secretary of Commerce, Secretary Kantor.

I would like to commend the Subcommittee for its interest in the unfair trade laws, which are so vital to America's well-being. The regulations are important to enforcement of the antidumping and countervailing duty laws. These laws safeguard our companies and workers from unfair and injurious pricing by foreign companies and from foreign government subsidies. These practices can undercut our firms, steal market share, drive our companies out of business, and throw people out of work.

In today's world, trade policy is a critical element of economic policy, and our unfair trade laws are an essential part of trade policy. As we liberalize trade to gain new markets abroad, we must maintain a level playingfield to ensure trade brings growth and an economy that generates jobs at home. Unfair trade is not genuinely free trade.

We have overhauled our regulations and practice to implement the Uruguay round legislative changes and to further President Clinton's and Vice President Gore's reinvention initiatives. The regulations on antidumping and countervailing duty procedures and antidumping methodology, which were made public on February 16, have been issued in proposed form.

After the public has had a full opportunity to comment, we will hold a public hearing at the Department of Commerce on June 7. Based on the written and oral comments we receive, we will then develop final rules.

I want to emphasize that, while these proposed regulations reflect extensive thought and reflection, we are very receptive to suggestions and new ideas, and we welcome any comments.

I would like to highlight the principles and objectives that guided us in drafting these rules. First, we have faithfully followed the spirit and the letter of the new law, the statement of administrative action that was so carefully worked out, and the Uruguay Round Agreements themselves.

Second, the proposed regulations are designed to promote vigorous enforcement and fair administration of the trade laws.

Third, we sought to promote the goals of openness, transparency, and predictability.

Finally, we have harmonized the rules for investigations and reviews. We have consolidated the procedures for the antidumping and countervailing duty laws and have adopted other changes to make the regulations more user friendly and accessible, especially for smaller size companies.

I appreciate the opportunity offered in the announcement of this hearing to address the relationship between the antidumping law and U.S. downstream industrial users. I believe industrial users

have an important role in antidumping proceedings, and we have recognized that in our proposed regulations. But Congress, in the existing antidumping law, has struck the proper balance recognizing that unfair, injurious trade practices affecting producers and workers in our own market must be addressed.

In a world of fierce competition, we have to be vigilant to avoid undermining that delicate balance. We should not reopen the legislative debate that led to this carefully worked-out balance.

Let me just take 1 minute to explain why it would be a great mistake to weaken the law with a short supply exception. It is important to focus on the reasons we continue to need dumping and subsidy laws. While we have made great progress in reducing trade barriers through the Uruguay round and the NAFTA, problems remain. The home markets of many of our trading partners remain partially protected and closed. Subsidies remain a fact of life in certain segments of our trading partners' economies. Much of our trade is with nonmarket economy countries. Some foreign governments continue to tolerate or encourage private anticompetitive behavior.

These practices allow firms to engage in differential pricing between markets or below-cost pricing. For example, government subsidies can allow firms to sell below cost. Other trade barriers, and cartels, and monopolistic behavior, can allow firms to reap high profits at home, which permits them to undercut their competitors in the United States.

The international marketplace is simply not governed by the competition rules that prevail in the United States. For this reason alone, the antidumping law is especially important. Abandoning or weakening the trade laws in a world of imperfect competition would amount to nothing less than unilateral disarmament.

With this background, I think this Subcommittee can understand why we have been so strongly opposed to proposals such as the short supply exception, which undermine the effectiveness of the laws. Such an exception would open a huge loophole. A foreign firm could dump to drive out U.S. competitors and then benefit from the short supply provision.

Suspending payment of duties could deter new investment by the injured U.S. industry, thereby retarding the recovery of the U.S. industry and undermining the effectiveness of the law.

Existing procedures are adequate to deal with legitimate concerns regarding supply without undermining the law.

With the fading of the cold war, international rivalry has turned more and more to economics. This is no time to dismantle our defenses in the face of unfair foreign competition. To the contrary, industries and workers across America have a right to expect us to use every means at our disposal to preserve jobs and business opportunities by defending against foreign unfair trade practices.

Thank you very much. I would be happy to answer any questions you might have. I want to say that with me here today is Ambassador Jennifer Hillman, who is General Counsel of the U.S. Trade Representative. As you know, the USTR was extensively involved in the Uruguay round legislative negotiations with us.

Chairman CRANE. We thank her for her presence.

[The prepared statement follows:]

**Statement of Susan G. Esserman
Assistant Secretary of Commerce
for Import Administration
Before the Subcommittee on Trade
House Committee on Ways and Means
April 23, 1996**

Thank you for inviting me to testify before this Committee today. I appreciate the opportunity to discuss the proposed antidumping and countervailing duty regulations.

As you know, the proposed regulations were published in the Federal Register on February 27. These regulations are necessary to implement the Uruguay Round legislative changes and also reflect our commitment to President Clinton's and Vice President Gore's Reinvention Initiatives.

The regulations are important to enforcement and administration of the antidumping and countervailing duty laws. The primary function of Import Administration (IA) is to enforce the antidumping (AD) and countervailing duty (CVD) laws enacted by Congress. These laws safeguard our companies and workers from unfair pricing by foreign companies that can undercut our firms and steal market share or drive our companies out of business. These laws also safeguard our industries from subsidies by foreign governments that can put our industries at an unfair disadvantage. Such basic industries as steel, semiconductors, glass, chemicals, and agriculture have all obtained relief through the unfair trade laws. In today's world, trade policy is a critical element of economic policy, and our unfair trade laws are a critical element of trade policy. As we liberalize trade to gain new markets abroad, we must maintain a level playing field to ensure that trade brings growth and an economy that generates jobs at home. Unfair trade is not genuinely free trade.

BACKGROUND

The proposed regulations encompass substantive rules on antidumping methodology, as well as procedural rules that apply to both antidumping and countervailing duty investigations. When the sixty-day public comment period ends next week, we will begin the process of analyzing the comments in order to prepare the final rules.

Commerce early last year solicited public comment in advance of the proposed regulations to ensure input from interested members of the public at the earliest possible stage. We received over 1500 comments from a wide range of industries, governments, and trade organizations. In our preamble to the regulations, we have addressed the great majority of the comments and suggestions that we have received and have done an exhaustive analysis of the many procedural and substantive issues raised.

I encourage you to provide any comments you have to my office.

THEMES

I would like to highlight the principles and objectives that guided us in drafting these rules.

- First, we have faithfully followed the spirit and the letter of the new law and the Statement of Administrative Action.
- Second, the proposed regulations are designed to promote vigorous enforcement and fair administration of the trade laws.
- Third, we sought to promote the goals of transparency and predictability. The regulations contain as much guidance as our experience permits about the

procedures and methodologies the Department will use in its antidumping and countervailing duty investigations.

- Fourth, the proposed regulations are streamlined. They eliminate repetition and consolidate procedural rules. For example, unlike the Department's existing regulations, which contained separate antidumping and countervailing duty procedural regulations, the proposed regulations combine procedural rules for both antidumping and countervailing duty investigations. The proposed rules also harmonize procedures for investigations and administrative reviews.
- Fifth, we have rationalized our data and information requirements without compromising our ability to vigorously enforce the trade laws. This includes streamlining the rules governing the submission of information, combining data requests for more than one period, and reducing the number of copies required.
- Finally, the language and organization of the proposed regulations are more user friendly. We made every attempt to explain complex terms in clear language that will be understood by the businesses that use these laws, and we included narrative explanations that place major provisions in context and explain how they relate to the statute.

The proposed regulations are just one part of our larger goal to streamline the conduct of antidumping and countervailing duty investigations and reviews. We have made every attempt to promote enforcement in the most effective and efficient manner possible. For example, in addition to the proposed regulations, we have improved our verification procedures and issued a new questionnaire that is shorter and easier to follow. The streamlining of our procedures is an ongoing process, and we will continue to seek suggestions for improvement.

I appreciate the opportunity offered in the Advisory announcing this hearing to "address the relationship between the antidumping law and U.S. downstream industrial users." The Congress in the AD law has struck a reasonable balance, recognizing that fair competition at home depends upon a level playing field in international trade.

At the same time, I believe that industrial consumers have an important role in the enforcement of AD laws, a role that has been strengthened by the recent amendment to the law confirming their right to participate in antidumping proceedings [777(h)], and a role that we have relied upon many times in the past to ensure that orders are tailored to address only injurious unfair pricing practices.

In closing, let me just say that we are committed to vigorous enforcement of the trade laws and to ensuring that our laws are administered fairly and in a transparent manner. The more efficient and effective our rules and procedures, the better we serve the American public.

PHILIP M. CRANE, ILLINOIS, CHAIRMAN
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COMMITTEE ON WAYS AND MEANS

U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON TRADE

May 3, 1996

Ms. Susan G. Esserman
Acting General Counsel
Department of Commerce
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Dear Ms. Esserman:

I would like to extend my thanks for your testimony on April 23 on antidumping issues before the Ways and Means Subcommittee on Trade. Again, I congratulate you on your hard work in producing the Commerce Department proposed regulations on antidumping.

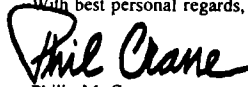
As I mentioned at the hearing, I have a number of additional questions concerning the proposed Commerce regulations as well as on H.R. 2822, the Temporary Duty Suspension Act. With respect to the Commerce regulations, I continue to be concerned over the proposal to deduct from export price any countervailing duties paid on behalf of the importer or reimbursed to the importer by the producer or exporter. I believe that this provision would result in the double-counting of such duties and higher, trade-inhibiting margins. The statute does not permit such a deduction, and there is no legislative history in which this Committee agreed that such a drastic change in Commerce practice should be made. In fact, I am concerned that this provision violates the WTO agreement. As the attached questions indicate, I would like more information as to the operation of the provision, its statutory authority, and its consistency with WTO obligations. I would appreciate the responses to these questions by May 10.

As to H.R. 2822, I have attached a number of questions concerning this legislation because I believe that the Commerce Department's objections to the bill are based on a misperception of how a temporary duty suspension bill can operate and the limitations of current authority. In fact, I continue to be disturbed that Commerce's position reflects a lack of concern about the global competitiveness of U.S. companies that must compete with imported finished products or that must export to survive. Failure to provide a mechanism for relief for these companies in limited circumstances, while maintaining the integrity of the dumping laws,

would amount to the "unilateral disarmament" you mentioned in your testimony. The fact is that current authority permits permanent relief only and allows the domestic industry that brought the antidumping petition to veto any relief. An industry would logically object to permanent relief in order to keep its options open to produce that product, even in the distant future. Current authority does not permit suspension of duties where the product is not available merely for a short period of time.

I would very much appreciate your response to the attached questions on temporary duty suspension by May 20, 1996.

With best personal regards,

A handwritten signature in black ink that reads "Phil Crane". The signature is written in a cursive, slightly stylized font. The first name "Phil" is written in a more compact, rounded script, while "Crane" is written in a more elongated, flowing script.

Philip M. Crane
Chairman

Chairman CRANE. Madam Secretary, I would like to pursue two lines of questioning; one on the concept of temporary duty suspension and one on the proposed regulations, especially the countervailing duty deduction that I mentioned earlier. And I will, also, have some questions to give you in writing.

First, let's address H.R. 2822. Can you say with confidence that all products and product specifications within the scope of a particular order are made in the United States?

Ms. ESSERMAN. I cannot say with confidence that all products within the scope of a particular order are made in the United States. But that does not mean that in appropriate situations where a U.S. industry is not producing a particular product, that that situation cannot be addressed under existing law.

Chairman CRANE. Well, given that the discretion would be so broad and the Department would not be obliged to provide relief, why would the provision increase the administrative burden on the Department, since the discretion is so broad? Wouldn't Commerce be able to dismiss easily any claim for relief that it believed was meritless?

Ms. ESSERMAN. Chairman Crane, if there were a provision such as the one that is proposed, I am absolutely confident we would receive requests for short supply exceptions in every case, and that would lead to a situation where our scarce resources at the Department of Commerce would be diverted from our real objective, which is trade law enforcement, which is so essential to our Nation's economy, to that of short supply administrators, and that would cause us great concern. It would totally undermine the law.

I am quite confident, if such a provision were in effect, we would receive those kinds of claims. And, in fact, you only need to look at the testimony that was provided by the Steel Service Center to get an indication of that.

They have indicated from a quick canvass of their members—a tentative canvass of their members—that a long list of products would be candidates for short supply application to the Department of Commerce. That is in only one industry. So that is why we are so terribly concerned about the resource implications, among many other things, of a short supply amendment.

Chairman CRANE. What is your position on whether and under what circumstances current law permits Commerce to alter the scope of an order, either temporarily or permanently?

Ms. ESSERMAN. There are a number of mechanisms under U.S. law to address valid situations of no supply. First, this issue may be addressed at the investigation phase when we are determining the scope of an order. In fact, we have made exclusions, during this initial investigation phase, in situations involving no supply.

Second, after an order is issued, we, at the Commerce Department, may address legitimate no supply issues, and we have done so in a couple of situations recently. That is, under the changed circumstances provision, parties may petition the Department for an exclusion and, under appropriate situations of no supply, we can make an adjustment.

Third, the issue of no supply may be dealt with by the International Trade Commission in addressing injury and, in some of the complaints that have been presented in the comments before

this Subcommittee, for example, in the wire rod situation, in fact, the situation was dealt with effectively. In that case, the International Trade Commission, taking into account, in part, the limited supply in the United States, reached a negative determination.

In addition, we may be able to address legitimate no supply issues in sunset reviews.

Chairman CRANE. Shifting momentarily to the proposed Commerce regulations, I have a couple more questions. Why is Commerce proposing a change in its practice by deducting countervailing duties from export price if the importer has been reimbursed? Given that Commerce has never made this deduction before, am I correct in assuming there must be a change in either the statute or the statement of administrative action that requires such a change and, if so, where?

Ms. ESSERMAN. Chairman Crane, we believe that that provision is totally appropriate and very consistent with our policies on rebates. If an exporter rebates an importer for a countervailing duty, it operates as a rebate to the importer and reduces the U.S. price. As with all rebates, it is deducted from the price to calculate dumping. So we believe this is totally in line with our general policy relating to rebates.

Chairman CRANE. And the final question. Why should Commerce change its practice and require the deduction of a subsidy margin in a countervailing duty case when the export price in an anti-dumping investigation of reimbursements occurred? The House has never voted for that kind of a change.

Ms. ESSERMAN. As I indicated, this is not a matter affecting our subsidy law. This is something that is directly related to our calculation of dumping. We are not putting a dumping duty on a subsidy. Now, in fact, what we are addressing is the action of the exporter to reimburse the importer and, when that occurs, it is appropriate to deduct that as a rebate, as we do with all other rebates. So this is not a matter of us double counting for the subsidy, the countervailing duty. This is an action to address the act of reimbursement.

Chairman CRANE. Well, wouldn't this rule amount to a double deduction of the countervailing duty margin?

Ms. ESSERMAN. Absolutely not. This is, again, something that is very different from deducting the duty. Rather, the action that is addressed is the action of an exporter reimbursing the importer for the subsidy and, in that situation, as with all other rebates, we would deduct that rebate from the U.S. price.

Chairman CRANE. Thank you, Madam Secretary.

Now, Mr. Rangel.

Mr. RANGEL. Madam Secretary, we appreciate the fine work you have been doing over the years, and we are fortunate to have you still with us to walk through this minefield. You might share with your colleagues at Commerce that I and other Members not only share their pain for the loss of the Secretary, but also the loss of so many other fine people that were on that team doing our country's work. We hope we can come over and express this personally without getting in the way of the work, the tremendous burden you now have to work under to continue to make progress in this area.

Now, you are proposing to streamline the antidumping procedure. You are going to have new regulations. You have certainly done all you could to have the public comment on it. What do you think is the biggest problem you have encountered in rewriting the regulations? Has it been controversial enough or is there any subject you received a lot of comments on? Because, if you have, we will. And how do you handle the hearings once you have a better idea of the comments coming in?

Maybe we ought to start first with the question of the type of comments you have had and the hearings you are going to have and, also, the most important thing is, What do you think you really remedied by streamlining the regulations?

Ms. ESSERMAN. Well, first, Congressman Rangel, let me thank you very much for your kind expression of condolences. I know you knew Secretary Brown very well from his very early days, and I very much appreciate your kind comments.

One of the biggest challenges we have had at Import Administration is to ensure we focus our scarce resources on the most important issues relating to enforcement, and that is why we have not only sought in our regulations to make changes to effectuate our Uruguay round changes, but we have taken every opportunity to focus on those issues most important to enforcement and to streamline our operations consistent with President Clinton's and Vice President Gore's reinvention initiatives.

So the biggest source of concern isn't so much regulations. It is how we can use our scarce resources to most effectively address the important issue of unfair trade practices.

We have not, at this point, received comments from the public on our regulations. I believe our comment period closes May 15 and, after that point, we are going to have a hearing at the Department of Commerce.

Mr. RANGEL. Streamlining, is it just doing the same thing with fewer people or was there something really accomplished rather than reduction in cost?

Ms. ESSERMAN. No. What we have done here is to target our resources more effectively to promote enforcement. We have done that a number of different ways. We are implementing an internal realignment within the Department. The purpose of that is to make sure we are focusing our attention, monitoring most closely the pricing practices of foreign producers immediately after an order is issued. So, we have restructured our operations to allow for that.

Second, we have focused very hard on how to make our verifications more effective. A verification is akin to an audit. That is when we really learn the most about the foreign exporters' pricing practices. We have been conducting training sessions to ensure our analysts are most knowledgeable and most effective in the way they are conducting their verifications.

We have, also, substantially revised our questionnaire. In past years, the questionnaire has been criticized by all parties. What we have done on this questionnaire is to provide a comprehensive approach so that we get the information as early as possible in the investigation so that our domestic industries have the greatest op-

portunity to comment on the information and the foreign exporters have a clear sense of the kind of informational needs that we have.

Mr. RANGEL. Could you send me a list of the type of witnesses or the names of witnesses you expect to call for your hearing?

Ms. ESSERMAN. I would expect, based on past history, we will have a wide range of domestic producers that are active users of the law, as well as foreign exporters—representatives of foreign exporters—and importers that bring in foreign products. I do hope we will have a good representation of small, medium, and large companies. It is very important to the Department to ensure our laws serve not only companies that are able to afford representation in Washington, but we are also able to assist the smaller companies that don't have resources for such representation.

Thank you very much.

Chairman CRANE. Mr. Thomas.

Mr. THOMAS. Thank you, Mr. Chairman. Thank you, Secretary Esserman. I, too, share the statements of sympathy and concern. It is very difficult for people to assume that it is to be business as usual in the context of it simply is not business as usual.

I noticed in the preamble to your regulations, you state the Department is going to, to the best of its ability on conducting scope investigations, accomplish them within a 300-day window. How does that compare to what it takes currently? My assumption is 300 days is a significant shortening from what we do now.

Ms. ESSERMAN. Well, that is the outer limit. Many of our scope determinations are conducted in a much shorter timeframe. But we do have a couple of very complex scope determinations that take more time. But some scope determinations are accomplished in quite a short period of time.

Mr. THOMAS. And some a lifetime.

Ms. ESSERMAN. Well, I wouldn't agree with a lifetime.

Mr. THOMAS. Well, not yet, no.

Ms. ESSERMAN. Some take a bit more time, given the complexity of the issues.

Mr. THOMAS. And that has been one of my concerns from the very beginning and, obviously, from earlier statements in terms of procedures, and that is why through the eighties we have tried to create procedures that produce relief, but, as is the case many times, relief is only relief if it is done in a timely way. One of my concerns is, in terms of anticircumvention relief, my understanding is that relief in those instances will continue to be prospective only. Was there any consideration to a retrospective relief structure?

Ms. ESSERMAN. Mr. Thomas, that is an issue that is actively under consideration. As I had indicated, our regulations are in proposed form only. I anticipate there may be some comments from the private sector on that. I appreciate your concern in that area, and that is something we want to look at very carefully because circumvention is a very important issue to address.

Mr. THOMAS. Well, I understand the difficulty in, first of all, establishing the facts and circumstances and then going forward and that you are not supposed to be using it as punishment.

But it seems to me in certain instances—and there may have to be criteria established—for egregiousness of the activity or, if it does extend to a very significant period of time, turning to these

former industries who are now closed and saying the relief will be prospective isn't really a whole lot of help. So I would be very curious to see how you noodle through that situation because I believe there are examples in the law currently and, obviously, antidumping, especially in terms of egregiousness, but also on a timeliness basis because it then indicates that you are doing the best you can and that, if facts and circumstances so dictate, you may take an extreme position. And I think that helps the people who are looking for you doing the right thing based upon facts and circumstances. Sometimes timeliness is the only right thing and, if you can't deliver timeliness, there may be a way to go back and redress the grievance that clearly the facts and circumstances have established if you are going to take action.

So I will be focusing, among other areas, on that particular aspect.

Again, thank you very much for your testimony.

Thank you, Mr. Chairman.

Chairman CRANE. Mr. Gibbons.

Mr. Houghton.

Mr. HOUGHTON. Thank you.

Madam Secretary, good to see you here. Thanks for your testimony.

Let me just try to understand what this thing is all about so far. If I produce a widget and that widget needs a component part from another country, what this bill is going to do is to give temporary duty suspension. You are claiming, however, that not only in the reorganization of your Department, but also in the authority you have, you don't really need that because you already have the ability to handle my problem in making that widget. And, furthermore, if you have this bill, that it will open the floodgates to things which you can't control.

Now, I am putting words in your mouth, and you correct me where I am wrong.

Ms. ESSERMAN. Well, I totally agree with that characterization. We do believe we have existing authority to address legitimate situations of no supply. We are quite concerned if a provision is added to our trade laws, we will have a situation that is totally unmanageable and we will divert our very scarce resources away from the business of Import Administration which is active trade law enforcement.

Mr. HOUGHTON. Thanks, Mr. Chairman.

Chairman CRANE. Mr. Ramstad.

Mr. RAMSTAD. Thank you, Mr. Chairman.

Like my colleagues, Madam Secretary, I want to express my sincere sympathy and respect for the loss of Secretary Brown and your other colleagues. My office was certainly impacted, like everybody in America was. Two of our staff members lost two of their best friends, and I certainly want to convey our sympathies as a staff.

Ms. ESSERMAN. Thank you very much.

Mr. RAMSTAD. Madam Secretary, there is a silicon metal shortage, a very serious one, facing a company in Minnesota, specifically, Spectro Allies Corp. of Rosemount, Minnesota. This company uses lower grades of silicon in its manufacturing and while higher

grades of silicon are produced in the United States, lower grades, which contain a maximum of 97½ percent silicon, are not. The company has been able to purchase lower grades from foreign sources in the past, but silicon is subject to substantial duties. In fact, prices have risen almost 50 cents a pound over the past few years. There just isn't enough silicon to operate past the second quarter of 1996 for this company in Rosemount, Minnesota.

Certainly, lifting duties, especially to China and Brazil, could help avoid a crisis.

Madam Secretary, like the company I just described in Minnesota, several of the witnesses have asserted they are unable to find products they need from domestic producers. It seems as though there is a real problem here. How would you suggest that that problem be addressed? And do you believe there are any circumstances under which a temporary duty suspension should be granted?

Ms. ESSERMAN. Mr. Ramstad, let me just say we have been recently alerted to a potential concern in the area you are raising, and we are in the process of meeting with parties to consider the issue.

As I have said, I do think there are mechanisms under existing law that address legitimate situations of no supply, and what you have to look at very carefully is what is the real issue and sometimes, when the issue gets presented as a problem from the dumping duty, the problem really isn't that. The problem is tight world supplies or other such factors.

However, what I would like you to know is that we have effectively addressed some of these issues. We have excluded a couple of products recently, even after an order was imposed. We have sought to exclude products from the order and have done that, even in the earliest stages of the investigation. So there are a number of ways in which we believe, under existing authority, we can address the problem.

We have, as I have indicated, a great deal of concern about the proposed temporary duty suspension bill.

Mr. RAMSTAD. I am not clear. Does that mean there are circumstances under which you would consider a temporary duty suspension?

Ms. ESSERMAN. No. We do not believe the current bill is appropriate because we believe, under existing authority under existing law, we can address the legitimate situations of no supply.

Mr. RAMSTAD. Let me ask you, just as a matter of followup in the remaining minute I have left, has the Department ever based a decision to revoke an order on lack of availability of that product?

Ms. ESSERMAN. Yes, we have, in two recent decisions, and we are, as I indicated in our preamble to our regulation, we have alerted the public that a new procedure we have been using is our changed circumstances provision and, under that authority, we are basing our determinations—one of the bases for changed circumstances exclusion is the lack of available supply, and we will, in the future, have no trouble providing, in appropriate circumstances, that that is a basis for an exclusion; that is, under appropriate circumstances.

Mr. RAMSTAD. So loss of interest by the petitioner is not the only basis for a changed circumstance review?

Ms. ESSERMAN. It is not the only basis for a changed circumstances review, but its lack of interest by the petitioner is a basis upon which we would grant an exclusion to an existing order.

Mr. RAMSTAD. Let me just ask you this, finally. My time is up, but Madam Secretary, I am really concerned about this company going under. It is that critical. They can't buy any more of this silicon, and the time is up for them. There are a lot of jobs at stake. You said you have been meeting with a number of people, I assume some from the private industry, who are so impacted. Would you or one of your designates be willing to meet with Greg Palen, who is chairman and chief executive officer of Spectro Allies of Rosemount, Minnesota?

Ms. ESSERMAN. Absolutely. We would be pleased to meet with him.

Mr. RAMSTAD. I would really appreciate that. He would be willing to fly out any time to sit down and talk to you about his specific situation.

Thank you very much, Madam Secretary.

Ms. ESSERMAN. Thank you.

Chairman CRANE. Mr. Levin.

Mr. LEVIN. Mr. Chairman, you very appropriately made reference to the grievous loss of Secretary Brown. I just wanted to take a couple of seconds to remind everybody of the role that Ron Brown and the Department played in the development of the antidumping provisions in the Uruguay round. We tend to go on to the next thing and not remember. And, if I might say so to the Secretary, I think if he were here today he would be proud of your testimony.

You know, we spent a lot of time on the antidumping laws in the Uruguay round, and I understand the differences of perspective. That is inevitable in matters as important and as complex as our antidumping laws. And when we went to Geneva those last few days, we confronted that complexity and the importance of the issue.

And reflecting the Secretary's interest, the Commerce Department played a very critical role. Indeed, I must say I think it was the indispensable role as we talked about these things within the American delegation, which had its own differences, and as we discussed these issues with the representatives of other nations.

And, essentially, a resolution was reached and, as Mr. Matsui said, a delicate balance was arrived at. And it would not have been possible without the longstanding personal interest of the Secretary and of his distinguished representatives who were there at that time. So I just want to say that the reason there are such deep feelings about the agreement that was reached and then the implementation language that was arrived at is that they both reflected a great deal of hard work and some real compromises. And I think we should all be wary of upsetting that apple cart at this moment.

But I mainly think your testimony reflects a continuity and the deep commitment of Ron Brown to the strength of American industry, the importance of a level playingfield, and he journeyed the globe to try to help American business take advantage of the level playingfield that he was so instrumental in helping to achieve.

So I just thought I would say that. And thank you for your testimony. I hope everybody knows the long, hard work you and USTR have put into these regulations. They don't come easily. They don't come automatically. They are a tribute to public service that Ron Brown was so proud of.

Thank you.

Ms. ESSERMAN. Thank you very much, Congressman Levin. I want to say we were very fortunate, I quite agree, to have someone like Secretary Brown, so dedicated to fairness around the world. I can only say that, if we had to have these very tragic circumstances, I am very happy we could have Secretary Kantor there to continue the mission because, as everyone knows, he has the same concern about fairness and addressing unfair trading practices.

Thank you.

Mr. LEVIN. Very much so. And thank you, Mr. Chairman.

Chairman CRANE. Madam Secretary, again, I want to thank you for your presentation and reassure you that we look forward to continuing our work together.

[The subsequent questions and answers follow:]



UNITED STATES DEPARTMENT OF COMMERCE
International Trade Administration
Washington, D.C. 20230
ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION

May 10, 1996

The Honorable Philip M. Crane
Chairman, Subcommittee on Trade
Committee on Ways and Means
United States House of Representatives
Washington, DC 20515

Dear Chairman Crane:

We are pleased to respond with the enclosed answers to the questions in your letter dated May 3, 1996, regarding the deduction of reimbursed countervailing duties.

Sincerely,

Paul L. Joffe
Acting Assistant Secretary
for Import Administration

Enclosure

QUESTIONS FROM THE COMMITTEE ON WAYS AND MEANS, SUBCOMMITTEE ON TRADE, U.S. HOUSE OF REPRESENTATIVES, ON THE DEPARTMENT OF COMMERCE'S PROPOSED ANTIDUMPING AND COUNTERVAILING DUTY REGULATIONS -- DEDUCTION FROM PRICES IN THE UNITED STATES OF REIMBURSED COUNTERVAILING DUTIES¹

1. Why is Commerce proposing a change in its practice by deducting the subsidy margin in a countervailing duty case from the export price in an antidumping investigation if the importer has been reimbursed? Given that Commerce has never made this deduction before, am I correct in assuming that there must be a change in either the statute or the Statement of Administrative Action that require such a change? If so, where?

Answer Any payment made by a seller to a buyer in connection with a sale is an element of the price which must be reflected in an antidumping calculation. How the payment is designated is irrelevant, as long as it is associated with the sale in question. No new statutory authority is required because the authority to make this deduction is the same as the authority to deduct any other rebate or discount, and so applies equally to reimbursed antidumping or countervailing duties.

2. The House has never voted in support of this drastic change. Why should language in the Senate Finance Report, which is not included in the statute, the Statement of Administrative Action or the House Report, appropriately cause Commerce to change its practice and require this deduction?

Answer This deduction will result in fairer and more accurate dumping margins. As explained above, any payment made by a seller to a buyer in connection with a sale is an element of the price which must be reflected in an antidumping calculation.

3. Wouldn't this rule amount to a double payment of the countervailing duty margin -- once in the countervailing duty case and again in the antidumping case?

Answer There is no double payment. Countervailing duties are intended to offset the subsidy provided to the foreign producer. The treatment of the reimbursement of countervailing duties in antidumping cases is an entirely separate issue. We deduct the reimbursed amount because it is a reduction to U.S. price which clearly is relevant to the calculation of the dumping margin.

4. I can understand the rationale for deducting an antidumping duty if the importer has been reimbursed by the exporter. After all, we want to avoid frustrating the price impact in the United States under such circumstances. In addition, there is explicit statutory authority for doing so, and Commerce has been making this deduction. However, in a subsidy context, we merely want to remedy the subsidy granted in the home market, not how the product is priced in the U.S.

¹ The proposed rule is of course subject to revision in light of public comments received.

market. It simply does not matter if the importer is reimbursed -- the subsidy would have been countervailed anyway. And I especially do not understand why you would crossover behavior under one statute into a penalty under another. Please comment.

Answer If a seller makes a payment to a buyer in connection with a sale, it amounts to a discount which must be accounted for in the dumping calculation, no matter how the discount is described or calculated. Permitting discounts for countervailing duties would allow exporters who happen to be subject to CVD orders to lower their prices by the amount of those duties without affecting the dumping calculation. Payment of countervailing duties is part of the terms of sale of doing business in the United States that has a direct effect on U.S. price. Reimbursement of countervailing duties, like any other term of sale that the seller assumes on behalf of the buyer, must be accounted for in the dumping calculation.

There is no explicit statutory authority to deduct reimbursed antidumping duties from prices in the United States. As stated above, the authority is the same as the authority to deduct any other rebate or discount, and so applies equally to reimbursed antidumping or countervailing duties.

Finally, countervailing duties are not intended simply as an increase in costs to exporters of subsidized merchandise. The remedy to which U.S. industries are entitled under the statute is the assessment of countervailing duties against imports of subsidized merchandise that are intended to offset the subsidy. Reimbursement of countervailing duties should not give rise to any special treatment under the antidumping law.

5. I am concerned that this proposal may violate the GATT 1994, the Subsidies Agreement, and the Antidumping Agreement because it requires that subsidies margins be deducted twice in certain circumstances. Please comment, especially to what extent the provision is consistent with Art. VI:5 of GATT 1994.

Answer Article VI(5) of the GATT prohibits the imposition of both antidumping and countervailing duties to offset the same situation of dumping and subsidization. The reimbursement of any cost or charge (including countervailing duties) in connection with a sale in the United States is a rebate which must be taken into account in calculating dumping margins. The motive of the exporter in giving the rebate, and the formula according to which the rebate was calculated, are irrelevant. The connection of the rebate or reimbursement to the sale renders it a "term of sale," for which Article 2.4 of the WTO Antidumping Agreement provides that an adjustment "shall" be made. The deduction for such discounts or rebates has nothing whatsoever to do with the situation of subsidization which gave rise to the countervailing duties.

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U.S. HOUSE OF REPRESENTATIVES
WASHINGTON, DC 20515

SUBCOMMITTEE ON TRADE

May 15, 1996

Mr. Paul L. Joffe
Acting Assistant Secretary for Import Administration
U.S. Department of Commerce
14th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20230

Dear Secretary Joffe:

Thank you for your letter of May 10, 1996, in which you respond to a number of questions I raised concerning the Commerce Department proposed antidumping regulations. The purpose of this letter, which I request that you incorporate as part of your official record on the regulations, is to comment further on five issues in the proposed regulations.

First, as I stated in my letter of May 3, 1996, I am still very concerned over the proposal to deduct from export price any countervailing duties paid on behalf of the importer or reimbursed to the importer by the producer or exporter. I believe that this provision would result in the double-counting of such duties and higher, trade-inhibiting margins. The statute does not permit such a deduction, and there is no legislative history in which this Committee agreed that such a drastic change in Commerce practice should be made. If Commerce were to implement this proposal, it would create dumping margins merely because the exporter reimbursed the importer for countervailing duties.

The simple fact is that the rationale for discouraging reimbursement of antidumping duties (as is permitted under current law) does not exist in the countervail context. With regard to antidumping, we want to avoid frustrating the corrective price impact of an antidumping duty in the United States through reimbursement. However, in a subsidy context, we merely want to remedy the subsidy granted in the home market, and it is irrelevant how the product is priced in the U.S. market. Accordingly, the statement in your May 10 letter that "any payment made by a buyer to a seller" in a countervailing duty case should be deducted in the antidumping case begs the question, in my view. In fact, I am concerned that this provision violates the Article VI:5 of GATT 1994, which prohibits the imposition of both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

I consider the proposed regulatory provision objectionable for the same reasons as was the "duty as a cost" provision which was rejected in the Uruguay Round legislative debate because it would amount to a GATT-illegal double-counting of duties. I do not understand how the rationale for the new deduction that you described in your letter is any different. In addition, I fail to see why a change must be made at this time, and I am not satisfied with the explanation in the May 10 letter in this regard. Making such a highly significant change, without being able to point to statutory language in the Uruguay Round implementing bill requiring such a sudden change, offends the so-called "balance" achieved in the Uruguay Round legislation that Secretary Esserman pointed to in our April 23 hearing. In short, I believe that if Commerce implements such a blatantly protectionist and ill-advised measure, the Subcommittee will be interested in pursuing other measures to restore the "balance" to our antidumping law and to minimize the opportunity for our trading partners to retaliate against U.S. exports.

As to the second issue of concern in the proposed regulations, I urge Commerce to give as much guidance as possible in defining terms throughout the regulations. I realize that a number of these issues must be determined on a case-by-case basis, but providing as much detail in advance will lend predictability and transparency to the proceedings. I refer especially to the lack of guidance on the subject of "affiliation" of parties for purposes of the dumping calculation. I realize that Commerce cannot at this time give precise guidance in the regulations, but without any guidance at all, parties cannot predict with any degree of reliability whether a sale at a given price actually constitutes dumping and will not know what a fair price would be. I believe that the lack of guidance hurts both petitioners and respondents. I suggest that the regulation state more clearly that the Department intends to focus on the ability to exercise restraint or direction over another party's pricing, cost, or production decisions -- issues that are the key elements of control relevant to antidumping issues.

Third, one of the fundamental concepts of the Uruguay Round legislation and the Uruguay Round agreement is that of fair comparison between export price and normal value. I am concerned that neither the proposed regulations nor the preamble states this fundamental premise. I encourage the Department, at the very least, to restate this principle in the preamble.

Fourth, as to the concept of short supply, I strenuously object to the language in the preamble stating that the regulations need not address short supply because current authority is adequate. I believe that current law is woefully inadequate in addressing the concept of availability, as was readily apparent at our April 23 hearing. At the outset, any existing authority provides permanent, and not temporary, relief. It does not permit suspension of duties where the product is not available merely for a short period of time. In addition, because the relief is permanent, the domestic industry would logically object to relief so that it may keep its options open to produce that product, even in the distant

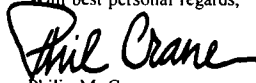
future. This objection acts as a veto to any relief to the downstream users. In addition, I have been told that, despite a number of requests for scope exclusions based on short supply, Commerce has specifically stated that it does not have the authority to consider availability. Nor do I believe that "changed circumstances" reviews are adequate because there is no opportunity for relief until 24 months after the order, the process is long and drawn out, and there is no opportunity for temporary relief. Accordingly, because of such a strong difference in opinion concerning the reach and effectiveness of current law, I strongly encourage the Department to delete the reference to short supply in its preamble to avoid controversy.

Finally, I applaud the Department for establishing guidelines for the consideration of the views of downstream users and consumer organizations in its determinations. These parties often have very relevant information, and I am glad to see that Commerce will address in its determinations the points that they make.

Once again, I would like to congratulate the Commerce Department for its outstanding work in producing the proposed regulations. I believe that the proposals provide considerable guidance concerning how Commerce intends to implement its statutory mandate given to it by Congress, which is necessary to assure predictability and certainty for all businesses affected. However, I believe that the revisions I have outlined above would make the regulations consistent with the statutory mandate set forth in the Uruguay Round Agreements Act. In addition, these changes would maintain effective antidumping laws while, at the same time, they would assure that the regulations do not go so far in the opposite direction as to encourage our trading partners to adopt trade-restrictive provisions in response. Accordingly, I strongly urge the Department to adopt these revisions in its final regulations.

I look forward to working with you as the final regulations are developed.

With best personal regards,


Philip M. Crane
Chairman



UNITED STATES DEPARTMENT OF COMMERCE
 International Trade Administration
 Washington, DC 20513
 ASSISTANT SECRETARY FOR IMPORT ADMINISTRATION

May 20, 1996

The Honorable Philip M. Crane
 Chairman, Subcommittee on Trade
 Committee on Ways and Means
 United States House of Representatives
 Washington, DC 20515

Dear Chairman Crane:

Thank you for your letter of May 15, 1996, in which you provided comments on five issues of interest to you in the Department's proposed antidumping regulations. We have placed your comments in the official record and will give them every consideration as we draft final regulations.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul L. Joffe".

Paul L. Joffe
 Acting Assistant Secretary
 for Import Administration

QUESTIONS SPECIFIC TO TEMPORARY DUTY SUSPENSION

1. In your testimony, you stated that Commerce has addressed "legitimate no supply issues." How do you define this term? Does it encompass: (a) a product that is not being produced in the United States, where domestic producers have no intention of making it; (b) a product that is not currently being made in the United States although some producers may do so in the future; or (c) a product that is made in the United States but in quantities and qualities that are not sufficient to satisfy demand?

A: Existing authority has in the past addressed and will continue to address a broad range of supply concerns, including in appropriate circumstances those you have listed. We will continue to administer this authority having clearly in mind the need to avoid undermining the effectiveness of the order.

2. Does current law permit Commerce to alter the scope of an order temporarily? Do you believe there are any circumstances under which a temporary duty suspension should be granted?

A: Under the new statute, antidumping and/or countervailing duty orders are themselves temporary. After five years an order must be revoked unless it is determined that dumping and injury will resume.

We do not believe there are any circumstances under which the proposal for a temporary duty suspension system can be established without undermining the dumping law. We find a temporary suspension objectionable for all of the same reasons we have opposed the various short supply proposals. A temporary suspension also is objectionable because it creates additional uncertainty, complexity and administrative burden. Existing authority more than suffices to address legitimate concerns over domestic availability.

3. Do U.S. purchasers of a product subject to an order or investigation have standing to alter scope or to revoke an order?

A: Commerce regulations have always permitted, consistent with the statute, initiation of a changed circumstances or scope review either at the request of an interested party or on the basis of other information available to the Secretary. Whether the purchaser is the importer, and thus an interested party, or not has not been a difficulty in addressing supply concerns, and will be even less so under the new law's explicit encouragement of comment by industrial users.

4. Has the Department ever based a decision to revoke an order based on lack of availability of that product? I understand that in recent cases, the Department has based the "changed circumstance" on the loss of interest by the petitioners. Is this the only basis for a changed

circumstances review? Isn't the threshold for showing interest very low -- in fact, a letter stating merely that "I am still interested," with no reason, is generally sufficient?

A: In recent cases we have responded to requests from foreign exporters and U.S. importers to remove a specific product from coverage of an order because it was not available domestically. In one of these cases, the importer attempted to and had no success purchasing the product domestically. Having been contacted by the purchaser, the petitioners in the original investigation notified the Department that neither they nor other domestic producers were interested in continued coverage of this product.

As Assistant Secretary Esserman noted in response to a question from Mr. Ramstad during the hearing, the lack of interest by petitioners is not the only basis for initiating a changed circumstance review.

5. A changed circumstances review may not be conducted until 24 months have lapsed from the determination, unless good cause is shown. Has Commerce ever found such good cause? If so, has this determination ever been made on the basis of availability of the product by U.S. producers?

A: In Flat Panel Displays from Japan, we revoked an order based on a request from petitioners who were responding to domestic availability concerns. The case established the principle that lack of interest by petitioners is good cause to conduct a changed circumstances review less than 24 months after an order is issued (in this case, 14 months after issuing the order on active-matrix liquid FPDs).

6. In the two instances mentioned in your testimony in which Commerce has recently made changed circumstances determinations, how long did it take for Commerce to make the determination from the time the changed circumstances petition was filed and from the time the original order was imposed?

A: In steel rail from Canada (100ARA-A new steel rail), we received a request for a changed circumstances review on October 20, 1995 (six years and one month from the issuance of the orders -- AD on September 15, 1989 and CVD on September 22, 1989). The notice of final results of review and revocation of the order in part was issued on March 21, 1996, five months from the date of the request and six years and six months from the issuance of the orders. The revocation was made retroactive to September 1, 1994 for the AD order and to January 1, 1995 for the CVD order.

In cut-to-length carbon steel plate from Canada (Cobalt-60 free steel), we received a request for a changed circumstances review on November 3, 1995 (two years and three months from the issuance of the order on August 19, 1993). The notice of final results of review and revocation of the order in part was issued on February 28, 1996, just over three months from the date of the

request and two years and six months from the issuance of the order. The revocation was made retroactive to August 1, 1995.

7. If a petitioner refuses to agree to a request for a changed circumstance review, is it possible for Commerce to grant the review and revoke an order anyway? Should a single producer have veto power if the domestic industry does not produce a particular product that is only a small part of the class or kind of merchandise subject to an order?

A: It is important to recognize that relief is granted only after petitioners have established a right under the law to a dumping duty -- after demonstrating both dumping and injury. The duty only requires that a fair price be paid. Given the purpose of the law, the high standard, and the considerable investment required to establish relief, we would be extremely wary of an approach involving granting an exclusion over the objection of petitioner.

We believe it is unlikely, in any event, that we will ever need to reach the issue of what effect a single producer's view would have on revocation, because our experience has been one of cooperation between industrial users and domestic producers. We expect this cooperation to continue.

8. With regard to your statement that the Department already has the authority to consider availability, hasn't the Department stated in numerous scope determinations that it does not have the authority to consider availability in making scope determinations? See, e.g., Certain Carbon and Alloy Steel Wire Rode from Brazil, 59 Fed. Reg. 5984 (Feb. 9, 1994) ("The Act and our regulations do not provide for consideration of domestic availability in determining whether a product should or should not fall within the scope of an investigation"), Certain Cold-Rolled Carbon Steel Flat Products from Argentina, 58 Fed. Reg. 37,062 (July 9, 1993) ("[T]he statute does not require the President to consider the domestic availability of a particular product within the scope when considering a scope exclusion request"). Are there any instances in which the Department altered the scope of an investigation or order in which it did not determine that the product was of a different "class or kind" of merchandise, based on physical characteristics? Can an order be revoked on the basis of availability alone?

A: Reviews to clarify the scope of an order are an additional method to address supply concerns, because the products subject to supply concerns may not be directly identified by the order and may have physical characteristics or uses substantially different than those of other products covered by the order. These physical characteristics or uses are relevant factors in deciding whether a product is within the scope of the order. In fact, scope reviews have not yet been needed to deal with supply concerns, in light of other authority, including changed circumstances reviews.

9. Under current law, are petitioners required or encouraged to identify products included in a petition that are not available from U.S. producers -- I realize that they can, but the question is whether they are required or encouraged.

A: We believe it is better to resolve supply concerns at an early stage, and we will continue to work with petitioners to identify any of which they are aware. We are continuing to refine our procedures for early notice of the views of industrial consumers to avoid later supply difficulties.

10. Short supply is not a new concept. Doesn't current law outside of the Title VII context permit consideration of availability, especially concerning Buy American provisions? Why is Title VII any different?

A: Title VII of the Tariff Act of 1930 deals with antidumping and countervailing duties. These laws do not preclude the importation of foreign products, nor do they express a preference for domestically produced products. Foreign products subject to AD or CVD orders may still be imported, but at a fair price. The AD and CVD laws merely provide for the imposition of duties in an amount equivalent to the amount of dumping or subsidization.

11. How easy would it be for a court to overturn a decision made by Commerce under H.R. 2822, given the courts' great deference to broad grants of agency discretion such as the discretion provided here?

A: A court will only grant deference to an agency's decision if it is in accordance with law and supported by substantial evidence on the record. This means that the agency must take great care to ensure that each of its factual conclusions is solidly grounded in a full and complete record. This task will be formidable in the case of highly controversial fact patterns, such as those we can expect to encounter under H.R. 2822. The Supreme Court has interpreted the "substantial evidence" standard as demanding that the reviewing court canvass the agency's entire record, taking into account whatever detracts from the agency's conclusions. Despite the painstakingly compiled records and carefully crafted conclusions in our present AD/CVD proceedings, the Department often spends years, sometimes as much as a decade, in the courts defending its determinations through judicial challenges, remands, and appeals.

12. Was the steel "short supply" procedure of the steel VRAs unduly burdensome on the Department (i.e., was the burden out of proportion to the benefit to the steel users)? Can you cite specific examples of undue burden?

A: Several dozen people were involved in responding to the approximately 250 steel short supply requests received. This level of commitment of resources was required even though steel is an industry Commerce has studied in some depth for 15 years. The resource commitment needed to administer a short supply program for the scores of industries covered by orders would be staggering.

13. The European Union has a temporary duty suspension provision under its antidumping law. I understand that it has invoked the law only once, in an antidumping case involving semiconductors. What is different about the U.S. system that would indicate that a similar provision in U.S. law would result in a "flood" of requests for relief?

A: The short supply provision of the EU turns on the political decision by the Member States as to the "Community interest," an essentially non-justiciable determination. By contrast, AD/CVD provisions in this country are rule-driven, required to be made on the basis of an administrative record, and, as our experience in the steel short supply program confirms, proceed from a strong tradition of litigation before the agencies of every important issue.

Chairman CRANE. Both CBO and the ITC have offered very insightful studies concerning the effects of antidumping orders on the U.S. economy. These studies definitively established that antidumping orders, as necessary as they may be to assist the domestic industry injured by dumping, have very negative effects on other U.S. companies.

And, with that, I will ask that Mr. Acton make his presentation first followed by Dr. Rogowsky.

**STATEMENT OF JAN PAUL ACTON, ASSISTANT DIRECTOR,
NATURAL RESOURCES AND COMMERCE DIVISION,
CONGRESSIONAL BUDGET OFFICE**

Mr. ACTON. Thank you, Mr. Chairman and Members of the Subcommittee.

I am pleased to appear here today to discuss U.S. antidumping law and policy and the proposed regulations to put in place the latest round of negotiations of GATT, the General Agreement on Tariffs and Trade.

With me is Dr. Bruce Arnold, who prepared the CBO, Congressional Budget Office, Study entitled "How the GATT Affects U.S. Antidumping and Countervailing Duty Policy" for this Subcommittee in September 1994, as well as Elliot Schwartz, who supervised its presentation and preparation.

With your permission, I would like to summarize my prepared remarks and ask that the full statement be included in the record.

Chairman CRANE. Without objection, so ordered.

And all written statements by witnesses will be a part of the record.

Mr. ACTON. Thank you.

CBO's review of current U.S. policy and the proposed regulations led to the following findings: First, U.S. antidumping law applies a different standard for judging pricing policies for imported products than antitrust law does for judging domestic products. Antidumping law serves primarily to protect U.S. firms from foreign competition, regardless of the impact on U.S. consumers and the economy.

In contrast, our antitrust laws serve primarily to encourage competition and protect individual consumers and the economy from harmful pricing practices.

Second, when a foreign exporter sells in the United States at a price below cost or at a price below the price it charges elsewhere, it almost always benefits the U.S. economy as a whole, except in the rare cases in which predatory pricing can be shown.

Nevertheless, individual firms and their workers may be temporarily injured by such practices. Beyond predatory pricing, economists and other observers have long recognized a variety of specific circumstances, often noneconomic, that may justify special treatment for certain industries unrelated to the specific issue of unfair price competition. These circumstances include national security and security of supply, economies of scale and externalities in production, temporary relief and adjustment assistance, and strategic bargaining to liberalize trade.

My written statement discusses these considerations in greater detail.

Our third finding is that U.S. firms seeking protection from foreign competition have come to rely almost exclusively on antidumping law rather than on antitrust law because it is easier for them to obtain a favorable ruling. Thus, in reviewing antidumping cases brought before the Department of Commerce and ITC, the International Trade Commission, CBO found the plaintiffs have been successful in a high percentage of the cases, at least for the period up through 1992 for which data were available.

Historically, once protection has been granted, it has been extremely difficult for foreign exporters to get it rescinded. In effect, protection has been permanent for some U.S. firms, sometimes extending for more than 25 years. The Uruguay round introduced a 5-year sunset provision on antidumping restrictions. Consequently, such long-term protection may become less common.

Fifth, the main beneficiaries of U.S. antidumping law and policies are the firms and workers that are protected. The main economic losers are the owners of and workers in U.S. businesses that use imported goods, as well as U.S. consumers who pay higher prices for their goods and services.

In addition, antidumping policy harms U.S. exporters as a whole because it leads to an adjustment in foreign exchange rates and a resulting decline in the competitiveness of U.S. exports in world markets. Moreover, foreign countries are following the U.S. lead by imposing antidumping duties on U.S. exports.

Finally, the regulations proposed by the Department of Commerce carry forward existing U.S. antidumping policies, with minor variations, within the framework of the Uruguay round of GATT negotiations. Although CBO has not had sufficient time to review these proposed regulations in detail, they do not appear to take into account their harmful effects on consumers and unprotected industries.

This concludes my oral summary, and I would be pleased to answer any of the Subcommittee's questions.

[The prepared statement follows:]

**STATEMENT OF JAN PAUL ACTON, ASSISTANT DIRECTOR
NATURAL RESOURCES AND COMMERCE DIVISION
CONGRESSIONAL BUDGET OFFICE**

Mr. Chairman and Members of the Subcommittee, I am pleased to appear here today to discuss U.S. antidumping law and policy and the proposed regulations to put in place the latest round of negotiations of the General Agreement on Tariffs and Trade (GATT). With me is Dr. Bruce Arnold, who prepared the Congressional Budget Office (CBO) study *How the GATT Affects U.S. Antidumping and Countervailing-Duty Policy* for this Committee in September 1994.

CBO's review of current U.S. policy and the proposed regulations led to the following findings:

- o U.S. antidumping law applies a different standard for judging pricing policies for imported products than antitrust law does for judging domestic products. Antidumping law serves primarily to protect U.S. firms from foreign competition, regardless of the impact on U.S. consumers and the economy. In contrast, our antitrust laws serve primarily to encourage competition and protect individual consumers and the economy from harmful pricing practices.
- o When a foreign exporter sells in the United States at a price below cost or at a price below the price it charges elsewhere, it almost always benefits the U.S. economy as a whole, except in the rare cases in which predatory pricing can be shown. Nevertheless, individual firms and their workers may be temporarily injured by such practices.
- o Over time, U.S. firms seeking protection from foreign competition have come to rely almost exclusively on antidumping law rather than on antitrust law because it is easier for them to receive a favorable ruling.
- o In reviewing antidumping cases brought before the Department of Commerce and the International Trade Commission (ITC), CBO found that plaintiffs have been successful in a high percentage of cases. Historically, once protection has been granted, it is extremely difficult to reverse. In effect, protection becomes permanent for the U.S. firm--sometimes extending more than 25 years. The Uruguay Round introduced a five-year sunset provision on antidumping restrictions. Consequently, such long-term protection may become less common.
- o The main beneficiaries of U.S. antidumping law and policies are the firms and workers that are provided protection. The main economic losers are the owners of and workers in U.S. businesses that use imported goods, as well as U.S. consumers who pay higher prices for their goods and services. In addition, antidumping policy harms U.S. exporters as a whole because it leads to an adjustment in foreign exchange rates and a decline in the competitiveness of U.S. exports in world markets. Moreover, foreign countries are following the U.S. lead by imposing antidumping duties on U.S. exports.
- o The regulations proposed by the Department of Commerce carry forward existing U.S. antidumping policies with minor variations within the framework of the Uruguay round of the GATT negotiations. Although CBO has not had sufficient time to review those proposed regulations in detail, they do not appear to take into account their harmful effects on consumers and unprotected industries.

WHAT IS DUMPING AND WHAT ARE ITS EFFECTS?

Economists widely agree that in the vast majority of instances free markets result in a higher level of economic efficiency and output than would be likely to arise from government intervention. That conclusion is true for both domestically produced goods and internationally traded goods.

One exception to that general conclusion is when a firm has substantial size and market power to raise its prices above competitive market levels. The antitrust and antidumping laws are concerned with possible pernicious results that can happen in those circumstances.

In addition, economists and other observers have long recognized a variety of specific circumstances--often noneconomic--that may justify special treatment for certain industries, unrelated to the specific issue of unfair price competition. Those circumstances include national security and security of supply, economies of scale and externalities in production, temporary relief and adjustment assistance, and strategic bargaining to liberalize trade. I will discuss those considerations later in my testimony.

What Are Dumping and Predatory Pricing?

Dumping refers to a foreign firm selling a product in the United States at a price below cost or at a price below that at which the firm sells the same product in its home market. The last is a particular example of what economists describe as "price discrimination," which is the practice of charging different prices to different groups of customers. U.S. antidumping law imposes antidumping duties on low-priced imports in order to deter dumping or at least offset its effects. However, antidumping law applies only to foreign firms selling in the U.S. market--a point I want to emphasize. When engaged in by domestic firms in the U.S. market, the same pricing practices are perfectly legal and not subject to special duties or any other punishment or offset.

Predatory pricing is the intentional selling of a product at a loss in order to drive competitors out of business. The seller thereby establishes increased market power that it can then use to raise its price above the competitive market level and increase profits. U.S. antitrust law is currently interpreted to prohibit predatory pricing by any and all firms, regardless of whether they are domestic or foreign.

Dumping and predatory pricing are not the same thing, and most dumping is not predatory pricing. Many people think that the sales below cost that antidumping laws prohibit must represent predatory pricing, since firms are in business to make money and would therefore never intentionally sell at a loss without some ulterior motive. In fact, however, sales below cost occur frequently in free markets for all kinds of nonpredatory reasons. For example, during recessions the profits of many firms drop into the red, which means that those firms are selling below cost. They continue to sell their products, however, because the sale price remains high enough to cover variable cost plus part of the fixed costs that they would continue to incur even if they quit selling.

Frequently, introducing a new product involves losses until the product becomes established in the marketplace and the firm works all of the bugs and

kinks out of its production and sales operations. Other reasons for below-cost pricing include loss leaders in sales, life-cycle pricing, legal constraints, and many others. Domestic firms engage in below-cost pricing and price discrimination in the U.S. market frequently with almost no legal constraint. Prohibiting foreign firms from doing so, as antidumping law does, puts them at a distinct disadvantage and deprives U.S. buyers of the benefits of lower prices.

Early in this century, when the first U.S. antidumping law was passed, pricing by domestic and foreign firms was treated similarly, if not identically. Antitrust law was interpreted to prohibit predatory pricing by domestic firms, and dumping was defined in a manner that approximated predatory pricing. Over time, however, antidumping law and policy have evolved along a path of ever-increasing protection for U.S. firms from imports and decreasing concern for consumers and the economy as a whole. Today, U.S. antidumping law and policy make no attempt to single out predatory pricing.

The Effects on the U.S. Economy of Predatory Pricing, Below-Cost Sales, and Price Discrimination

Even when pursued by domestic firms in the U.S. market, predatory pricing impairs economic welfare because it leads to monopolies, which in turn cause economic inefficiency and raise concerns about social equity. When foreign firms engage in predatory pricing in the U.S. market, it is even worse because it eventually results in U.S. firms and consumers paying monopoly prices to foreign firms. However, domestic and foreign firms seldom employ predatory pricing because only rarely does it succeed in driving competitors out of business and even more rarely is it a profitable strategy. By contrast, nonpredatory price discrimination and sales below cost generally provide net benefits to the economy receiving the lower price, and both are relatively common.

Clearly, the U.S. economy benefits when it purchases a product for less than the cost to produce it. The alternatives are to produce the product domestically--and thereby incur the entire cost of production--or else to purchase it elsewhere for a price equal to or greater than the cost of production. Either way the cost to the economy is greater than the cost of purchasing the dumped product.

Similarly, the U.S. economy also benefits when it obtains a product at a lower price than other countries can obtain it. When such products are purchased by firms that produce other goods, the lower price gives U.S. firms a competitive advantage over foreign firms. For example, if the antidumping laws result in a substantial increase in the price of semiconductor chips or flat-panel displays in the United States, computer manufacturers have an incentive to take their production operations overseas in order to get their chips and displays at lower prices. Similarly, actions that increase the price of steel increase the problems that U.S. automobile manufacturers have competing with manufacturers in Japan.

In the case of products purchased by final consumers, U.S. consumers obviously benefit by being able to purchase products at lower prices than consumers in other countries must pay. If anyone is to complain about price discrimination, it should be the firms and consumers in countries forced to pay the higher price, not those in the United States getting a lower price.

A domestic analogy illustrates how U.S. antidumping law treats foreign price cutting differently from domestic price cutting. If a department store had a sale in which it sold some products for less than those products cost the store, no consumer would complain to the store that it was being unfair. Similarly, if the store gave a particular consumer a better price than it gave others, that consumer would not be likely to complain. Yet that is exactly what the United States does as a consumer of products of foreign firms. Through our antidumping laws, we prohibit foreign firms from giving us a good deal. We insist that they not sell to us at a price below cost, and we insist that they give us no better a deal than they give their own citizens.

One might argue that consumers would certainly object if the department store sold below cost or practiced price discrimination for the purpose of driving its competitors out of business so that it could then jack up its prices sky high. That practice, indeed, would be bad for the consumer and for the economy generally. Monopoly prices and lack of competition cause economic inefficiency and raise concerns of equity and fairness. That kind of behavior, however, is not mere selling below cost or price discrimination it is predatory pricing. However, U.S. antidumping law and policy make no attempt to restrict imposing antidumping duties to the few cases that could represent predatory pricing.

By contrast, in cases of predatory pricing under the antitrust laws, the Federal Trade Commission and the courts do attempt to zero in on predatory pricing. They tend to look for evidence of such factors as prices below average variable cost (not just below average total cost), large enough market share and sufficient barriers to other firms' entering the market to make a monopoly and subsequent price increases feasible, and local price cutting in particular markets rather than general price cutting in all markets. In short, mere price discrimination or selling below average total cost is not usually sufficient for demonstrating predatory pricing.

The difference between antidumping law and antitrust law as it relates to predatory pricing is aptly characterized by two observations: (1) antitrust law protects consumers and the efficiency and productivity of the economy, whereas antidumping law protects certain producers at the expense of consumers and the efficiency and productivity of the economy, and (2) antitrust law seeks to preserve competition, whereas antidumping law seeks to restrict it.

Who Benefits and Who Is Harmed by Laws Against Below-Cost Sales and Price Discrimination?

Imports sold below cost or below the price at which they are sold in the exporter's home market benefit the U.S. economy as a whole, but they can injure individual firms and their workers.

Workers who are potentially affected by dumping are worried about losing their jobs. Permanent loss of one's job can be quite costly. It may take months to find another job, and the new job might not be as good as the one lost. In a full-employment economy, however, both displaced workers and capital can be expected to find reemployment eventually. In that respect, as in other aspects of dumping, the economic effects of job loss are the same whether the causes are domestic or foreign. Thus, the main beneficiaries of

antidumping law are import-competing firms and their employees and to some extent the communities surrounding them.

However, antidumping law protects firms and workers at the expense of the rest of the economy. The sectors of the economy that are hurt by antidumping law include consumers and consuming industries that use imported goods as inputs for production. Firms in those industries are put at a competitive disadvantage in the international marketplace when antidumping laws force them to purchase inputs at higher prices than their competitors pay abroad. That disadvantage can create incentives for domestic firms to move their operations abroad to avoid antidumping duties on their imported inputs.

Another, less obvious but no less significant, U.S. group hurt by antidumping law is U.S. exporters. They are harmed in two ways. First, other countries are following the U.S. example in imposing antidumping laws. Moreover, some of them have aimed the enforcement of their laws especially at U.S. exporters in retaliation for the United States' use of its antidumping law.

The second way U.S. exporters are hurt is less visible. The primary effect of trade protection is to reduce U.S. imports. Since domestic savings and investment-- which determine the trade balance--are unlikely to change, reduced imports will lead to reduced exports. To put it another way, if the United States effectively refuses to buy imports by putting up trade barriers such as antidumping laws, foreign countries will have fewer dollars with which to buy U.S. exports.

When Protection from Imports May Be Appropriate

Despite the broad agreement that freer trade is almost always better for the economy as a whole than trade restrictions, trade protection can sometimes be appropriate in supporting national objectives. Those circumstances generally involve noneconomic considerations or periods of temporary disruption and transition rather than the pricing practices addressed by antidumping law. Some specific examples are worth noting.

First, national security considerations may lead the United States to try to preserve domestic capability to produce certain key products that would be difficult to create rapidly during a period of threat or conflict. Those products could include advanced technology applications, weapon systems, or critical materials that are inputs to defense capability. Existing U.S. policies--including stockpiling and procurement policies--seek to ensure such capability, and they may represent a more effective and efficient approach than antidumping policies.

Second, certain market conditions may justify a departure from total free trade. Those conditions include situations in which there are increasing returns to scale or positive benefits to the country from having a specific industry in the United States for which firms in that industry would not naturally be compensated by the normal workings of the market. In such cases, strategic trade theory has shown that carefully chosen market intervention by the government can offer certain benefits. However, empirical research to date has indicated that those benefits are quite small and that it is very difficult to determine which industries are likely to accrue such benefits. As a result, even

some of the early proponents of strategic trade theory have concluded that a general policy of free trade is preferable.

Third, proponents of trade restrictions also note that departures from completely free trade may be helpful in the long run by providing temporary relief to assist the recovery of an industry or the transition to a new economic reality. In the United States, there has long been support from many quarters for temporary restrictions to ease the adjustment to unexpected disruptions from imports. Specifically, the section 201 escape clause provides for temporary restrictions to ameliorate surges of imports that are injuring a domestic industry. The idea is to smooth the transition and adjustment, not to eliminate the need for adjustment.

Finally, the act of getting rid of its own protection will generally help a country's economy regardless of what its trading partners do with their trade barriers. In practice, however, trade negotiators may use bargaining chips to achieve the overall objective. In trade negotiations, countries usually try to get their partners to get rid of barriers in exchange for eliminating their own restrictions.

Although each of those considerations could provide a basis for restricting trade, the antidumping laws and regulations that the Commerce Department uses to restrict trade do not take into account any of those reasons for protection. Moreover, as will be discussed later, antidumping law is not a good substitute for the section 201 escape clause.

HOW DOES ANTIDUMPING LAW CURRENTLY FUNCTION?

Although modern antitrust law as it relates to predatory pricing applies to imports as well as domestically produced goods, it is virtually never used in the case of imports. Competing firms are almost always the ones to bring cases against aggressive pricing by foreign and domestic firms. In the case of imports, they can obtain protection much more easily under antidumping law than they can under antitrust law.

However, antidumping law has replaced more than just antitrust law. Antidumping law is now a fairly general source of protection from foreign competition with very little relation to the fairness of that competition. Over the years, the Commerce Department's procedures have evolved in the direction of making it more and more difficult for foreign firms to defend themselves successfully against charges of dumping. Indeed, the main hurdle to an industry seeking protection under antidumping law is to demonstrate that it has been injured by the imports, not that the imports are dumped.

The Department of Commerce found dumping in 93 percent of the 339 cases that came before it for final determination from 1980 through 1992, whereas the International Trade Commission found injury in only 66 percent of the 315 cases that subsequently went to final determination. From 1988 through 1992, the numbers were even more lopsided: the Commerce Department found dumping in 97 percent of the 126 cases that came before it for final determination, whereas the ITC found injury in only 59 percent of the 122 cases that subsequently went to final determination. Thus, although the Department of Commerce found dumping quite often in the cases it reviewed, according to the ITC, about 30 percent to 40 percent of those cases involved no economic harm to competing firms.

Those statistics suggest that the main hurdle in antidumping cases is establishing injury, not proving that the competition is unfair. The purpose and function of the section 201 escape clause is to protect domestic industries from injurious surges in import competition. The degree of injury that must be demonstrated in antidumping cases, however, is less than that required in section 201 cases. For that and other reasons, the section 201 escape clause is now seldom used. A domestic industry generally finds it much easier to obtain protection under antidumping law. However, using that law as a general source of protection from imports has several disadvantages.

First, in the past antidumping law did not have the restrictions that the section 201 escape clause had to ensure that protection is granted only temporarily for the purpose of aiding adjustment and only in cases in which the benefit to the protected industry outweighs the harm to the rest of the country in economic, foreign policy, and security matters. Further, to get an antidumping order revoked, a foreign firm usually had to get a determination from the Commerce Department that it had ceased dumping, and such a determination was difficult to obtain. Hence, for all practical purposes, protection under antidumping law tended to become permanent. Some outstanding antidumping cases have been in effect for more than 25 years.

Permanent protection of industries is almost always detrimental to the economy and is contrary to the basic thrust of U.S. trade policy since World War II, which has supported the philosophy that all countries should eliminate trade barriers. The Uruguay Round introduced a five-year sunset provision on antidumping restrictions. The restrictions may be extended if a review determines that dumping would be likely to continue or to recur. At this stage, it is too early to know if that sunset provision will terminate most dumping-related restrictions. But if it does, it will represent a pro-competitive change in U.S. trade law.

Second, other countries have begun to follow the U.S. lead. They are now using antidumping laws to protect their industries, and many of them are targeting U.S. exports in retaliation for U.S. use of antidumping laws against them. The new World Trade Organization (WTO) agreement puts the imprimatur of world approval on much of U.S. antidumping policy and as such may hasten that development. Therefore, not surprisingly, although support for U.S. antidumping law and procedures among import-competing firms remain strong, sentiment against them is rising in the growing community of U.S. exporting and importing firms.

Third, even in those cases in which protection is considered desirable, antidumping law sometimes provides inadequate protection. It applies only to imports of the product in question from particular countries or firms and not to all imports of the product from any source. Therefore, it can be--and sometimes is--circumvented either by the firm on whose products the duties are imposed or by the impersonal workings of the international market. Consequently, the United States has had to devote considerable attention in recent years to modifying antidumping law to make it apply to upstream dumping, downstream dumping, dumping routed through third countries, and various other routes by which antidumping orders have been circumvented.

**THE URUGUAY ROUND, IMPLEMENTING
REGULATIONS, AND PROPOSED SHORT-SUPPLY LEGISLATION**

U.S. antidumping law constitutes protection of domestic industries from foreign competition without regard for the fairness of that competition or for the economic welfare of the country. As such, it is an anomaly in U.S. trade policy, which in most areas favors free trade and opposes protection. Similarly, the provisions in the General Agreement on Tariffs and Trade have also been an anomaly.

In the Uruguay Round of GATT negotiations, which created the new World Trade Organization, antidumping law and policy were major issues of discussion. A result of the negotiations was a new Antidumping Code for the WTO. By and large, that new code serves to ratify most of current U.S. antidumping policy.

Although the new code does not require major revisions to U.S. policy, it does require minor reforms of some of the more protectionist aspects of that policy. To carry out the Uruguay Round Agreement, the Congress passed the Uruguay Round Agreements Act, which went into effect on January 1, 1995. On February 27, 1996, the Department of Commerce proposed new regulations to carry out the antidumping provisions in the act.

CBO has not yet had a chance to study those new regulations in depth. We assume that they are generally consistent with the new Antidumping Code and as such that they do not change the basic character of U.S. antidumping policy. In some instances, the Commerce Department had some leeway in the extent or character of changes it could choose to make while remaining consistent with the new Antidumping Code and the Uruguay Round Agreements Act. In addition, proposed short-supply legislation would permit the department to suspend antidumping restrictions under certain economic conditions. If the department uses that leeway to reduce the protection U.S. antidumping law affords to domestic industries, the results should benefit the economy, increase the equality of treatment of domestic and foreign firms, and make antidumping policy less inconsistent with the rest of U.S. trade policy. If the department uses the leeway in the opposite direction, the reverse will be true.

Chairman CRANE. Thank you, Mr. Acton.
Dr. Rogowsky.

**STATEMENT OF ROBERT ROGOWSKY, DIRECTOR OF
OPERATIONS, U.S. INTERNATIONAL TRADE COMMISSION**

Mr. ROGOWSKY. Thank you. I am pleased to be asked to discuss the findings of the U.S. International Trade Commission's comprehensive study "The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements" which was completed and published in June 1995.

The U.S. Trade Representative requested the ITC measure the economic effects of both unfair trade practices and the remedies imposed under U.S. antidumping and countervailing duty laws, specifically, the economy-wide net welfare effects and the analysis of conditions in the petitioning, the upstream and the downstream industries or consumers.

From 1980 through 1993, 682 antidumping and 358 countervailing duty cases were decided in the United States. Nearly 40 percent of the antidumping and just over 21 percent of the countervailing duty cases resulted in affirmative final determinations and remedies. It is important to note the amount of total imports covered by AD/CVD duties is relatively small, typically less than 0.4 percent of the total U.S. imports.

These cases have potentially large effects on subject imports, however, given that the weighted average yearly antidumping margins can reach as high as 70 percent. The value of imports subject to the affirmative dumping order has dropped, on average, almost 32 percent in the year following the final determination.

Nonsubject imports of the same products generally rose about 24 percent. It is noteworthy that in cases where antidumping petitions were filed, which received no affirmative final determination, the value of subject imports still fell, on average, about 24 percent. The average volume of nonsubject imports and these products increased nearly 20 percent.

The estimated overall net effect of the gain to the economy from removing all of the outstanding AD/CVD orders in place in 1991 would have been \$1.59 billion. This represents the economic effect, in terms of lower prices, if the less-than-fair-value imports were permitted on remedy. This figure includes gains to downstream industries or consumers and loss to industries competing against the less-than-fair-value imports.

Eight case studies were conducted in which a detailed analysis of each industry was examined to get the dynamic effects at work in the marketplace. These case studies showed that AD/CVD cases can have quite different effects. Most accomplished the intended effects. Domestic prices rise and product increases while subject imports fall.

But other market forces, like shifts in demand and changes in competitive conditions, can govern their final effect on downstream industries and consumers. Frozen concentrated orange juice imports from Brazil were 75 percent lower after the dumping duty, while domestic consumption increased. Prices stabilized at a higher level as Brazil both turned to non-United States markets and es-

tablished a pricing formula tied to the United States spot market to avoid further United States antidumping duties.

Steel pipe and tube prices and domestic production increased after the antidumping order went into effect, and the import penetration rate declined. The long-term decline of prices of EPROMS only slowed after the antidumping case and implementation of the semiconductor agreement, of which EPROMS was a part.

Antidumping duties on foreign brass sheet and strip reduced subject imports an estimated 73 percent. But aggressive competition in the industry kept the prices down while the foreign competition spurred quality improvements. Subject ball bearing prices increased by 5 to 10 percent. Most notably, the rapid foreign investment in the United States and continued aggressive competition within the bearing industry considerably reduced the effect of the antidumping action.

Subject solid urea imports ceased completely following the imposition of the order, while nonsubject imports from Canada increased by about 38 percent. Urea prices rose about 9 percent.

Both analysis and interviews of producers in the color picture tube industry indicated the antidumping actions didn't have much affect on that industry at all. So, while AD and CVD cases typically increased prices, the effect will depend heavily on how sensitive consumers are to those prices. When the subject product is a small component of downstream firms overall demand for consumers' purchases, such as the case of ball bearings or brass sheet and strip, demand is not diminished by higher prices and higher costs by those firms are absorbed.

When downstream industries are competitive, those prices are generally passed on to consumers.

I thank you for the opportunity to come before you, and I am happy to answer any questions.

[The prepared statement and attachment follow:]

Statement of Robert Rogowsky
 Director of Operations
 U.S. International Trade Commission
 Before the Subcommittee on Trade
 House Committee on Ways and Means
 April 23, 1996

I am pleased to be asked to discuss the findings of the U.S. International Trade Commission's comprehensive study, *The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements* (Inv. No. 332-344), which was completed and published in June of 1995.

The United States Trade Representative requested that the USITC measure the economic effects of both unfair trade practices and the remedies imposed under U.S. antidumping (AD) and countervailing duty (CVD) laws, specifically: (1) economy-wide net welfare effects, and (2) analysis of conditions in the petitioning, the upstream and the downstream industries or consumers.

Overview of the Caseload

From 1980 through 1993, 682 antidumping and 358 countervailing duty cases were decided in the United States. Nearly 40 percent of the antidumping and just over 21 percent of the countervailing duty cases resulted in affirmative final determinations and remedies. It is important to note that the amount of total imports covered by AD/CVD duties is small, typically less than 0.4 percent of total U.S. imports.¹

These cases have potentially large effects on subject imports, however, given that weighted average yearly antidumping margins reach as high as 70 percent. The value of imports subject to affirmative antidumping orders dropped on average almost 32 percent in the year following the final determination. Nonsubject imports of the same products rose 24.0 percent. It is noteworthy that in cases where antidumping petitions were filed, but which received no affirmative final determinations, the value of subject imports still fell by 24.0 percent. The average volume of nonsubject imports of these products increased nearly 20 percent.

Economy-wide Analysis

The estimated overall net effect of the gain to the economy from removing all the outstanding AD/CVD orders in place in 1991 would have been \$1.59 billion. This represents the economic effect in terms of lower prices if the less than fair value imports were permitted unremedied. This figure includes gains to downstream industries or consumers and loss to industries competing against the less than fair value unfairly imports.

Case-study Effects

Eight case studies were conducted, in which a detailed analysis of each industry examines the dynamic forces at work in the marketplace.

These case studies showed that AD/CVD cases can have quite different effects. Most accomplish the intended effect: domestic prices rise and production increases, while subject imports fall. But other market forces, like shifts in demand and changes in technology can govern the effect on downstream industries and consumers.

Frozen concentrated orange juice imports from Brazil were 75 percent lower after the dumping duty, while domestic consumption increased. Prices stabilized at a higher level as Brazil both turned to non-U.S. markets and established a pricing formula tied to the U.S. spot market to avoid further U.S. antidumping duties.

Steel pipe and tube prices and domestic production increased after the antidumping order went into effect and the import penetration rate declined.

The long-term decline of prices of EPROMS only slowed down after the antidumping case, and implementation of the Semiconductor Agreement, of which EPROMS was a part.

Antidumping duties on foreign brass sheet and strip reduced subject imports an estimated 73 percent. Aggressive competition in the industry, however, kept prices down while the foreign competition spurred quality improvements.

Subject ball bearing prices increased by 5-10 percent after duties were

¹The value of subject imports and weighted average margins need to be treated with some caution since data for 49 (or 18 percent) of the 270 AD cases and for 38 (or 50 percent) of the 76 CVD cases were not available and are not included.

imposed. Subject imports fell by 2 to 6 percent and nonsubject imports increased. Most notably, rapid foreign investment in the United States and continued aggressive competition within the bearings industry considerably reduced the effect of the antidumping action.

The countervailing duty imposed on New Zealand lamb gave rise to a 10 percent increase in US prices and a 92 percent increase in nonsubject Australian lamb.

Subject solid urea imports ceased completely following the imposition of the order, while nonsubject imports from Canada increased by about 38 percent. Urea prices rose by 19 percent and domestic shipments by 48 percent.

Both analysis and interviews with the U.S. Color Picture Tube producers indicate that the investigation process did not have a significant impact on the industry.

While AD/CVD cases typically increase prices, the effect will depend heavily on how sensitive consumers are to prices. When the subject product is a small component of upstream firms' demand or consumers' input, such as the case of ball bearings or brass sheet and strip, demand is not diminished by higher prices and higher costs are absorbed. When downstream industries are competitive, such as farmers purchasing fertilizer made from solid urea, increased prices are likely pushed directly through to consumers.

Again, I thank you for the opportunity to present the findings of the Commission's study and would be pleased to answer any questions.

PHILIP M. CRANE, ILLINOIS, CHAIRMAN
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May 17, 1996

The Honorable Peter Watson
Chairman
U.S. International Trade Commission
500 E Street, S.W.
Washington, D.C. 20436

Dear Chairman Watson:

I want to extend my thanks to you for making Dr. Robert Rogowsky available to testify April 23 before the Subcommittee on Trade on antidumping issues. His testimony was very helpful in explaining the International Trade Commission's study on the economic effect of antidumping and countervailing duty orders.

As you know, one of the issues discussed at the hearing was H.R. 2822, the Temporary Duty Suspension Act. I would appreciate it if you would advise me as to whether the ITC has already developed a position concerning this bill and whether an antidumping or countervailing duty order should be suspended temporarily on a limited quantity of a particular product needed by the American industry when users are effectively unable to obtain that product or form of product from U.S. producers. If the ITC has not already adopted a position on this issue, I would appreciate your own view, including to what extent current ITC practice permits consideration of availability both during an investigation and after an order is in effect.

Sincerely,



Philip M. Crane
Chairman



UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

May 23, 1996

Dear Chairman Crane:

Thank you for your letter of May 17, 1996. I am pleased that Dr. Rogowsky's testimony was helpful in clarifying the International Trade Commission's (ITC) study on the economic effect of antidumping and countervailing duty orders at the April 23, 1996 Subcommittee hearing.

You have asked if the ITC has developed a position on H.R. 2822, the Temporary Duty Suspension Act, which provides that an antidumping order or countervailing duty order should be suspended temporarily on a particular product currently unavailable from domestic producers and needed by American industry (Short Supply Provision). In response, the Commission does not have a formal position on this Bill, and therefore, as requested, what follows are my own views as an individual Commissioner on those issues which pertain to the ITC's mandate.

Commenters have suggested that a Short Supply Provision is unnecessary because both the Department of Commerce (DOC) and the ITC have the ability to undertake "changed circumstances" reviews. The Commission's authority to conduct such a review and revoke all or part of an antidumping or countervailing duty order in place is provided pursuant to Section 751(b) of the Tariff Act of 1930. A Commission changed circumstances review investigation may not, however, be instituted "less than 24 months after the date of publication of the notice of suspension or determination" in the absence of "good cause." The existing interpretations of "good cause" apparently do not extend to cover short

supply situations.¹ Thus, a changed circumstances review investigation may, under existing statutory interpretations, not be normally available to interested parties for at least two years after the initial determination.²

A review of relevant law suggests that Commission changed circumstances reviews do not address the same needs that are addressed by a Short Supply Provision. One purpose of a Short Supply Provision would be to meet the 'temporary' need of downstream purchasers when the products under investigation are not currently available in sufficient quantity from domestic producers. This need may well exist at the time of the original AD or CVD determination, as well as two years after the investigation. An ITC changed circumstance review, however, focuses the Commission's review primarily on the issue of whether continued dumping of the subject imports would cause material injury or threat of material injury to the domestic industry. Section 751 was clearly not designed to be used at the time of, or immediately following, an affirmative AD/CVD determination. Moreover, a revocation of an order pursuant to a Section 751 review would be permanent, not temporary.

It has been asserted that the Commission may consider changing supply and production patterns when conducting "sunset reviews" which are required by the Uruguay Round Agreements Act, and therefore that sunset reviews might obviate the need for a Short Supply Provision. As a result of the Act, beginning in the year 1998, the Commission will indeed begin conducting injury reviews of all outstanding five year old AD/CVD orders. However, while the Commission may well consider changing supply and production patterns when conducting sunset reviews, it is not at all clear what weight the Commission will place on those factors. Moreover, reviews of this kind would not be conducted until five years after an order was put in place.

¹19 U.S.C. §1675(b)(4). The Commission has stated that "good cause will be found only in an unusual case." This may include: (1) fraud or misfeasance in the original investigation; (2) acts of God, as exemplified in the FCOJ case where a severe freeze sharply reduced the U.S. producers' shipments of FCOJ; (3) mistake of law or fact in the original proceeding which renders the original proceedings unfair. Turkish Review Determination at 6, citing Frozen Concentrated Orange Juice from Brazil, 49 Fed. Reg. 34312 (Aug. 29, 1984).

²Commerce regulations are similar. The Secretary will not initiate a changed circumstances review "before the end of the second annual anniversary month (the calendar month in which the anniversary of the date of publication of the order or suspension occurs) after the date of publication of the Secretary's affirmative preliminary determination or suspension of investigation," unless the Secretary finds that good cause exists. 19 CFR §353.22(f)(3)

At the ITC, there have been at least 29 requests for a changed circumstances review. Of these, only 14 reviews have been initiated³ and only six have resulted in revocation of an order. In three of these review investigations, no domestic producer objected to the review or revocation of the order.⁴ In another review, the Commission revoked the order after learning that there had been no dumping of subject imports for the previous two years, a rationale unrelated to the level of domestic supply.⁵ There appears to be only one review investigation in which the Commission revoked an existing AD order based on lack of sufficient domestic supply in the face of domestic opposition.⁶ In this case, the Commission reviewed (for the third time) an order which had been in place for some nine years and found that all three of the domestic producers had either ceased operations with no intent to resume or were no longer producing the product.

Of the eight review investigations which did not result in revocation of an AD order, short supply was an issue for six of these reviews.⁷ For these six reviews, revocation was denied, even where domestic production or supply was lacking or nonexistent, if a domestic competitor either produced a comparable product, produced only some of the product needed to meet current demand, or was *preparing* to enter the market to produce a comparable product.

It has also been suggested that the ITC, in making an AD/CVD determination of whether the subject imports are a cause of injury to the domestic industry, already has the discretion to take into account the fact that sufficient quantities of the product under investigation may not be produced in the United States, and this factor will thus will be reflected in its injury determination. In investigations where Commerce's scope determination includes foreign

³A summary of those cases are set out in the attached Appendix.

⁴See Potassium Chloride from Canada, Inv. No. 751-TA-3, Synthetic L-Methionine from Japan, Inv. No. 751-TA-4, and Bicycle Tires from Korea and Taiwan, Inv. Nos. 751-TA-12-13.

⁵See Electric Golf Carts from Poland, Inv. No. 751-TA-1.

⁶See Salmon Gill Fish Netting from Manmade Fiber from Japan, Inv. No. 751-TA-11.

⁷The six include: Television Receiving Sets from Japan, Inv. No. 751-TA-2, Salmon Gill Fish Netting from Manmade Fiber from Japan, Inv. No. 751-TA-5, 751-TA-7, Birch Three-Ply Door Skins from Japan, 751-TA-6, Frozen Concentrated Orange Juice from Brazil, 751-TA-10, and Liquid Crystal Display Television Receivers from Japan, Inv. 751-TA-14. The two review investigations for which short supply was not a major issue include Acrylic Sheet from Japan, Inv. 751-TA-8 and Dry-Cleaning Machinery from West Germany, Inv. 751-TA-9.

merchandise for which there is no equivalent domestic production, it is true that this factor, when present, may be considered by Commissioners in making their injury determination.⁸ In the great majority of such investigations, however, the scope also includes foreign merchandise for which there is equivalent domestic production. In such investigations, a small percentage of all products covered under the scope typically fall into a category of having no equivalent domestic production, so the fact that there is no equivalent domestic production for such foreign products may be given little weight by the Commissioners. To my knowledge, there has never been a case in which the ITC has made a negative injury determination based primarily on the fact that there was insufficient or no equivalent domestic production.

It has also been suggested that if the petitioning industry is not producing a competing product, there likely will be no lost sales or adverse price impact with respect to the particular merchandise and this will be a factor taken into account by the ITC in making the overall injury determination. As noted above, it is very rare to see a case in which the scope does not include foreign merchandise for which there is comparable domestic production. In cases in which "short supply" may be an issue, the scope generally includes foreign merchandise for which there is no domestic like product as well as foreign merchandise for which there is comparable domestic like product.

Thus, in the great majority of investigations, there will be lost sales and price effects data even where the scope may include products for which there is no comparable domestic production or competition. In such investigations, unless Commerce amends the scope of an AD/CVD order, duties are imposed on *all* foreign merchandise covered under the scope, regardless of whether some of the

⁸ The fact that some of the products covered under the scope may have no equivalent domestic production is, however, only *one* factor among many which the Commissioners consider in making their overall injury determination. In *Silicon Carbide From the People's Republic of China*, Investigation No. 731-TA-651, the Commission assessed the condition of the domestic industry and noted as one "relevant economic factor", that the industry was divided into two market segments. As a result, competition between the subject imports (mostly crude) and the domestic like product (mostly crystalline) was somewhat attenuated. Although the Commission noted in its discussion of the condition of the domestic industry that the domestic industry produced only an insignificant amount of crude silicon carbide, a careful reading of the Commission's determination (See, Section IV.) does not support a conclusion that this fact was considered material by the Commission.

products under the scope have no comparable domestic production or whether they actually compete with the domestic like product.⁹

Parties have also suggested that the ITC can find “niche” products and exclude them from an injury finding, and that any product not subject to an affirmative injury finding cannot be subject to duties. However, even if the scope of the investigation includes imported products which are not produced domestically, an affirmative ITC injury determination will result in duties on *all* products covered under the scope of the investigation, regardless of whether such imported products are found to constitute a “niche” product. The “niche” product determination is really only relevant for Commissioners in their assessment of substitutability and the degree of competition between the domestic product and the subject merchandise. Thus, the “niche” determination only has an impact on the injury determination itself and not on whether any such “niche” products are to be excluded from any AD/CVD order resulting from an affirmative determination. Once an affirmative injury determination is made, a “niche” finding by the ITC does not lead to exclusion of any such product from an AD/CVD order, unless, of course, Commerce amends the scope of its investigation to exclude such products.

I hope the above is responsive. Please advise me if you have any questions.

Very truly yours,



Peter S. Watson

cc: The Commission

⁹Sebacic Acid from China, Inv. No. 731-TA-653 (Final) provides a good example of an investigation in which the scope includes foreign merchandise which compete with the domestic like product as well as foreign merchandise for which there was no competing domestic production. In this investigation, the ‘domestic industry’ could not commercially produce sebacic acid with sufficient purity to meet its downstream customer’s requirement, and thus imported the required product from China to satisfy this demand which it could not satisfy. The scope of the investigation covered both the high-purity product (which the petitioners themselves could not produce and thus imported from the Chinese) as well as the lower purity product, which competed with the domestic like product. An affirmative threat determination by the ITC resulted in duties on all products covered under the scope, including the high-purity sebacic acid, even though such products had no comparable domestic production.

APPENDIX

A Summary of Changed Circumstances Reviews Initiated by the ITC

In Electric Golf Carts from Poland, Inv. No. 751-TA-1 (1980), the changed circumstances noted by the ITC included the improvement of the competitive condition of the industry as the result of greater concentrations of production since the imposition of relief. Further, new marketing strategies had been developed that led to greater financial success for domestic producers. Thus, the domestic industry was in a much better position than at the time relief was first imposed for reasons unrelated to the existence of the AD duty order. In addition, it appeared that the domestic industry was not price sensitive and that there had been no dumping of subject imports for the last two years. ITC determined that the AD order should be revoked. (conclusion: revocation had nothing to do with short supply)

In Television Receiving Sets from Japan, Inv. No. 751-TA-2 (1980), the changed circumstances noted by the ITC included the transformation of the domestic industry as a result of a fundamental relocation of certain production operations resulting in a new international division of labor and the adoption of technological improvement reducing total labor content. Notwithstanding these changes, after a full review, ITC determined that the domestic industry would be threatened with material injury if the AD order were revoked.

In Potassium Chloride from Canada, Inv. No. 751-TA-3 (1980), the changed circumstances included the revocation of the AD order as to all Canadian producers except one and the closing of a number of U.S. mines due to depleted reserves. Further, the request for review and revocation was not opposed by any domestic producer. Following the review, the order was revoked. (conclusion: order was revoked due to lack of any domestic competition and opposition)

In Synthetic L-Methionine from Japan, Inv. No. 751-TA-4 (1981), the ITC instituted this review because it appeared that no domestic producer produced the subject merchandise. This constituted the change in circumstances apparent to the ITC at the time the order was originally imposed. Further, no domestic producer opposed institution of the review or revocation of the order as to L-Methionine. Following the review, the order was revoked.

Salmon Gill Fish Netting from Manmade Fiber from Japan, Inv. No. 751-TA-5 (1981). The alleged changed circumstance was the lack of domestic production of salmon gill fish netting due to inferior domestic technology. A domestic producer opposed the petition but conceded the lack of domestic production. A review ensued with the ITC ultimately determining that there was a sufficient commitment to the establishment of a domestic industry and that the establishment of such an industry would be materially retarded should the AD order be revoked. An important factor in the ITC's determination was that the U.S. producer committed to establishing a salmon gill fish netting operation was dependent on the supply of necessary yarn from Firestone Fibers and that Firestone had the capacity to supply the necessary yarn.

In Birch Three-Ply Door Skins from Japan, Inv. No. 751-TA-6 (1982), the principal alleged changed circumstance in this review was the sale of a domestic producer who accounted for the majority of domestic production. Following the sale, the facilities were devoted to the production of other products. In addition, it was alleged that three other domestic producers had ceased operations and that the market share of the Japanese producers was lost, not to domestic producers, but to other foreign suppliers. Following the review, ITC determined not to revoke the order as there was substantial idle U.S. and Japanese capacity and the U.S. was the principal market for the subject merchandise.

In Salmon Gill Fish Netting from Manmade Fiber from Japan, Inv. No. 751-TA-7 (1982), a second review of this order was conducted on the ITC's own initiative following receipt of information suggesting that Firestone Fibers was ceasing production of nylon, a necessary raw material for the domestic production of the subject merchandise, and that the sole prospective domestic producer (Nylon Net) had no alternative source of raw materials. Following review, the Commission determined not to revoke the order as two other domestic producers had since commenced production of products that competed with subject imports and these producers would be injured should the order be revoked.

In Acrylic Sheet from Japan, Inv. No. 751-TA-8 (1983), the changed circumstance warranting review was the development of a new type of acrylic sheet that had been included in the scope of the order, had a specific end use, cost 6 to 8 times more than the domestic product, and had no domestic competition. The review was terminated as moot following a DOC ruling that the merchandise should not have been included in the scope of the order.

In Dry-cleaning Machinery from West Germany, Inv. No. 751-TA-9 (1984) a review was considered following a 1982 request for review alleging that domestic consumption had increased, larger machines had been developed, and imports had declined. The review was dismissed following the opposition of a number of domestic producers. In 1984, a review was instituted following a subsequent unopposed request. The request contained allegations similar to those in 1982 but also alleged that West German producers had developed new "flexible" machines that were priced substantially higher than domestic machines. Upon review, however, the ITC determined that the imports did compete with the domestic product and that price was an important factor in purchase decisions. ITC determined that revocation was not warranted.

In Frozen Concentrated Orange Juice from Brazil, Inv. No. 751-TA-10 (1984), the changed circumstance warranting a review of a suspension agreement included a severe freeze in Florida that sharply reduced domestic production and a surge in demand for the Brazilian product. Upon review, the ITC determined that the short-term effects of the freeze would dissipate and that the domestic industry remained vulnerable to the effects of imports from Brazil.

In Salmon Gill Fish Netting from Manmade Fiber from Japan, Inv. No. 751-TA-11 (1986), in this third review of the Salmon Gill Fish Netting order, the changed circumstances underlying the review included the fact that two of the domestic producers had ceased operations with no intent to resume, while a third was not producing specialty nets and no longer produced salmon gill nets. Following review, the order as to salmon gill fish netting was revoked.

In Bicycle Tires from Korea and Taiwan, Inv. No. 751-TA-12-13 (1987), the changed circumstances warranting the institution of these two reviews were the ceasing of production by the sole domestic producer and its expressed intent to import and not resume production. Following a review the order was revoked.

In Liquid Crystal Display Television Receivers from Japan, Inv. No. 751-TA-14, the alleged changed circumstance warranting review was the development of small screen liquid display television receivers since the imposition of the order and the lack of competition from any domestic product. Following review, the ITC determined not to modify the order to exclude the LCD TVS, finding that they were not limited to small screen TVS, they competed with domestic cathode ray TVS, and notwithstanding their different technology, they were part of the same like product - television receivers generally.

Chairman CRANE. Thank you, Dr. Rogowsky. I want to congratulate you both on these fine studies. As we all know, empirical analysis merely describes real-life effects. It doesn't address whether a particular practice is appropriate. That is a policy and value judgment, as I believe all of the ITC Commissioners would agree.

Congress has decided, despite the documented effects on downstream users and consumers, that certain domestic industries should obtain relief from certain pricing practices that injure them. That, I think, is unlikely to change and, in fact, shouldn't change. However, I believe there is room to explore escape valves for those downstream users where the petitioning industry would not be injured by those mechanisms. And that is the intent of my bill.

Dr. Rogowsky, to what extent does the ITC study address an interesting point made in the CBO study about the impact of antidumping orders on U.S. exporters, especially relating to the adjustment in the foreign exchange rates and the competitiveness of U.S. exports as well as the impact of mirror legislation?

Mr. ROGOWSKY. Our study did not directly look at the effect on U.S. exporters. We were strictly sticking to the request letter looking at the effect on U.S. petitioning industry and upstream and downstream consumers. So we did not directly look at that issue.

Chairman CRANE. But would you agree that that suggests the estimated effect on the economy is conservative?

Mr. ROGOWSKY. We feel our estimates are fairly conservative on the effects.

Chairman CRANE. Mr. Acton, can you explain why, in your view, restricting imports also leads to a restriction in the ability of U.S. companies to export?

Mr. ACTON. Yes, Mr. Chairman. Primarily, the effect is foreign customers need to have dollars in order to pay for U.S. exports, and they get those dollars by selling their own exports to the United States. So the erection of protectionist barriers by the United States really chokes off some of the supply of dollars that foreigners need to purchase U.S. exports.

Chairman CRANE. And, Dr. Rogowsky, can you please describe whether or not current ITC practice permits consideration of availability, both during an investigation and after an order is in effect? And, if you can, please give us an idea of the magnitude of cases in which the ITC made its decision based on availability and, if you have any examples you can use, please do so.

Mr. ROGOWSKY. Well, the Commission—I hate to comment on what the Commissioners consider. Commissioners have broad discretion over what to consider when they make their decision as to the imposition or the determination that there has been material injury in a case. I am afraid I do not have before me any numbers or calculations on how often that has happened.

Chairman CRANE. All right.

Mr. Rangel.

Mr. RANGEL. Thank you. Mr. Acton, Commerce had some reservations to make about the report, and I think they made them before your report was completed. Did that have any impact on the report? Were any changes made as a result of their comments?

Mr. ACTON. CBO received a number of very useful comments when our report was in draft form, Mr. Rangel, and those com-

ments, including those from the Department of Commerce, were very useful in helping us clarify the presentation at a number of points that had been obscure. They also caused us to shift the emphasis away from the early history of the development of U.S. trade law around 1900 to focus on today's circumstances. I think that was the especially useful contribution they made. They raised some questions that required us to document statements, and we were pleased we were able to substantiate the conclusions that were contained in that draft. I think it was a stronger study for their comments.

Mr. RANGEL. I am glad to hear that. Would these proposed regulation changes, had they been in effect, have had any impact on either of the two studies at all? I mean, were they taken into consideration or would it have any effect as to what your conclusions were in your report, Dr. Rogowsky?

Mr. ROGOWSKY. When we were doing our study, we knew of the proposed changes that were being negotiated, and we discussed those changes in our report. They did not really affect the analytical framework or the conclusions from that framework.

Mr. RANGEL. Well, that is really what I meant. Were the proposed changes discussed with the CBO? I know you are saying that you considered them. It would not change the report. Would you say the same thing?

Mr. ACTON. We did not consult the Department of Commerce while it was developing these proposed regulations, to my knowledge, and I will confirm that with others at CBO.

Mr. RANGEL. What I am saying is, based on what you know today, as it relates to proposed regulation changes, could that possibly have any effect on the conclusions you reached in your report?

Mr. ACTON. I think, as I indicated, the Uruguay round put a sunset provision on antidumping duties. I think that is a positive move, in terms of not making the protection that we called attention to permanent.

Mr. RANGEL. Thank you, Mr. Chairman.

Chairman CRANE. Thank you.

Mr. Houghton.

Mr. HOUGHTON. Thank you. Mr. Acton, I think you said something about in order to export, you must have the proper ingredients in your product, which then produces cash abroad and then keeps the whole cycle, something to that effect; is that right?

Mr. ACTON. Yes, sir.

Mr. HOUGHTON. So I can imagine a situation—and correct me if I am wrong here because I might be—I produce a piece of machinery, and I need product *x* for that machinery. Product *x* has been produced by a company who has driven three or four industries in this country out of business. So, therefore, I have a suspension of the duty. I buy that product. I export the product. I gain cash in the foreign market in order to continue to buy from the company that put three or four businesses out of business. Now, could that happen?

Mr. ACTON. I think it is important to ask about the mechanism by which a foreign firm came to dominate a particular market. If it was the worldwide low-cost producer—

Mr. HOUGHTON. The foreign firm would dominate the market by dumping and, therefore, the duties would be increased, which you now want to suspend.

Mr. ACTON. If the foreign firm was dumping for purposes of predatory pricing; that is, for the purposes of driving all of the competition out of existence and then turning around and getting greater than normal profits for the remainder of its economic life, economists would call attention to that as an area of worldwide economic loss and concern.

If the foreign firm had a natural cost advantage because of a low-cost supply of raw materials or some other reason, it may be part of the give and take in international trade, where comparative advantage leads us to the most efficient source of production for all goods and services. And, as you indicate in your example, that output is used in the United States, where we have a comparative advantage.

Mr. HOUGHTON. Have you ever worked in business?

Mr. ACTON. I worked at the Rand Corp., which is a think tank for the U.S. Government, and through college I worked in a furniture factory.

Mr. HOUGHTON. Right. You have never worked in a business which has been seriously affected by dumping from international products.

Mr. ACTON. The furniture firm, with which I worked throughout my college career, was always subject to strong competition from production abroad, but I was not an equity holder in that company.

Mr. HOUGHTON. No, I don't mean that. But I mean you did not work for a company or did not know people who were losing jobs in a company that were severely affected by somebody who was then convicted of dumping processes.

Mr. ACTON. I believe that is correct.

Mr. HOUGHTON. Now, let me ask Dr. Rogowsky, Dr. Rogowsky, on your second page, you say, on the third-from-the-last paragraph, "The analysis and interviews with the U.S. color picture tube producers indicate that investigative processes did not have a significant impact on the industry." My, whom did you talk to?

Mr. ROGOWSKY. We talked to a number of different firms in that industry, including some chief executive officers, but mostly production managers, people running plants. Part of the reason for that is the people who are producing color picture tubes are also producing color televisions, and they also produce the components going into the color picture tubes and other components going into the production of color tubes.

Mr. HOUGHTON. Well, as you know, in the color picture tube business, there are glass envelopes and then there are tubes, and then there are picture tubes, and then there are sets. So it is a segmented business. Some of it is brought together and some of it isn't.

Mr. ROGOWSKY. Right. Well, as I say, we spoke to people in the industry, and part of the reason you come up with that conclusion is that the industry, because of its integration, is both a winner from lower dumped prices and also a loser from lower dumped prices. And so the perception from the people we talked to in the industry was that the process from the antidumping action was not

a very significant factor in that industry, given all of the other changes going on. And keep in mind, there were quite a number of technological changes occurring as the industry was making adjustments, primarily to much larger television sets.

Mr. HOUGHTON. Could I just continue 1 minute longer, Mr. Chairman?

Chairman CRANE. Certainly.

Mr. HOUGHTON. I guess the thing that has bothered me, and I didn't really have a chance to go through this report. I did the executive summary. But, if I remember correctly, Ambassador Kantor asked you to look at two basic areas; the economic impact and the consequences of foreign subsidies, and so on and so forth, and the effectiveness and the economic impact of the remedies. And, it seems to me, you concentrated on the remedies rather than the first part to give what I would consider is not a particularly balanced picture. Maybe you would like to explain that or tell me where I am wrong.

Mr. ROGOWSKY. I appreciate the opportunity. We feel we did a very thorough analysis, based on the request made to us, and we feel it was balanced. Some of the things that are most easily read in the report can tend to lead you to the conclusions you are coming to. But, if you look at the case studies, which is where most of the effort went in the report, we made that effort with the idea we would be able to look indepth at the market forces at work in at least eight different industries, so we could understand the conditions for the petitioning industry, for the upstream industries and for the downstream industries, and bring those pieces of information and that analysis to bear to understand what was going on inside those industries. That process was lengthy, including hearings. We interviewed firms all over the country to try and make sure we got their input and incorporated it in the study.

In that, we, indeed, did try to look at what the effect of the dumping was on those industries, both the unfair practices and the effect of the remedies.

Mr. HOUGHTON. Well, I would like to read this thing in the full text to try to get an understanding of it, but I must say it appears to me your study was heavily weighted toward only one part of Ambassador Kantor's two questions. And, if the conclusion on the overall study is the same as you have said here in terms of the color picture tube business, I would have serious questions.

Thanks very much.

Chairman CRANE. Well, again, gentlemen, we appreciate your appearing here to testify before the Subcommittee, and we are grateful for your insightful studies and look forward to ongoing input from both of our valuable resources, ITC and CBO.

Thank you.

Mr. ACTON. Thank you.

Mr. ROGOWSKY. Thank you, sir.

Chairman CRANE. Our next witnesses are distinguished scholars, who have spent years studying the antidumping law. Dr. Michael Finger, lead economist for Trade Policy and International Trade Divisions of the World Bank, and Joe Cobb, John M. Olin Senior Fellow, the Heritage Foundation.

Gentlemen, if you will take your seats, and then we will open with Dr. Finger. All printed material will be made a part of the permanent record.

**STATEMENT OF MICHAEL FINGER, PH.D., LEAD ECONOMIST
FOR TRADE POLICY AND INTERNATIONAL TRADE
DIVISIONS, WORLD BANK**

Mr. FINGER. Thank you very much, sir. It is a privilege and a pleasure for me to appear before you. I would like to point out that, while I have worked at the World Bank for the last 15 years, I am on vacation today. So I am appearing as a private citizen.

While I have had the opportunity, while working at the World Bank, on many occasions to discuss economic policy with members of many governments, this is the first time I have had the honor and the privilege of appearing before Members of the U.S. Congress, and I must say it is a special privilege and honor for me to be here.

I would like to begin by bringing your attention to the fact that over the past decade and a half there has been a significant amount of liberalization, removal of import barriers, to put it simply, in developing countries.

In the paper I have provided you, there is a list of countries of which there are some 16 who have reduced their tariffs by more than one-third. These reductions were done unilaterally, not as a part of a negotiation, which considered one's import restrictions as a national asset to be bargained away only in exchange for someone else's import restrictions. These decisions were made because the governments involved reviewed their own import policies, decided their import restrictions, while helping some sectors of their economy, imposed additional costs or higher costs on other sectors of their economy. So these governments decided it was in the national economic interest to remove these import restrictions.

Unfortunately, these countries, while following the example of the United States and the other industrialized countries in removing import restrictions, are now following them in the process of finding ways to impose new import restrictions, particularly anti-dumping. A significant part of my work over the past few years has been to try to convince countries not to backslide on the liberalization they have undertaken, and I should like to provide you a couple of anecdotes about experiences I have had.

In a small country I won't identify, the Deputy Minister with whom I was speaking presented his case in this way. He said, "In our country, farmers raise chickens. If you want chicken for dinner, you go to the market, and you buy a chicken. But in the United States . . ." he explained ". . . farmers don't raise chickens. They raise chicken parts. And because customers in the United States are afraid of cholesterol, they buy the white meat, and so the white meat sells for a high price and the dark meat or the legs get sold in our country at a price lower than our farmers usually get for chickens."

His conclusion was, "That is dumping, isn't it? So shouldn't we take action?"

I didn't argue with him about whether or not it was dumping. I did suggest we talk about the question of whether it was in the

national economic interest of his country to take action. We reviewed what consumers were saving, where consumers were spending the money they would otherwise have spent on chickens, and it turned out they were spending it mostly in the local economy and, in this case, the Deputy Minister concluded they probably wouldn't take action against chicken legs.

I had the honor of hearing the executive director of the Taiwan International Trade Commission describe his situation. According to him, Taiwan has had 29 antidumping investigations over the past 5 years, most of these involving industrial inputs. The case he cited as an example, the petitioners filed a set of coordinated petitions against a list of products. The Commission examined the petitions, found them to be in order, found the information in them to be accurate, and imposed a preliminary antidumping order. Immediately after, users of the products came forward and asked them to remove the order because it was costing them more than it was benefiting the other guys.

The Commissioners investigated the allegations, determined that, yes, indeed, it was costing users more than it was benefiting producers and so they lifted the antidumping order.

To sum this up, since the red light is about to go on, there are now in the world a number of governments who are realizing that users of imports are a part of their national economies and, in the process of deciding when it is in the national interest to impose an import restriction, it is useful to examine the impact on users as well as the impact on petitioning producers.

The lesson I draw from this is that the short supply bill would introduce the opportunity of putting this element of economic sense in the deliberation process, which the U.S. Government goes through as it decides to restrict or not to restrict imports.

I might add, from my perspective, it would also be very useful for me if I had an example of a country as important as the United States whose process reflected this basic economic sense.

Thank you very much for your time. If you have questions, I would hope to answer them.

[The prepared statement and attachments follow:]

**STATEMENT OF MICHAEL FINGER, PH.D.
LEAD ECONOMIST FOR TRADE POLICY AND INTERNATIONAL TRADE DIVISIONS
WORLD BANK**

My name is Michael Finger, and I live in Arlington, Virginia. For the past fifteen years I have been employed by the World Bank, but today I am on leave from the Bank and am here in a personal capacity as a citizen of the United States. During my years at the World Bank I have had many opportunities to discuss economic policy with officials of many governments. This is, however, the first time I have been invited to share my experience with members of the United States Congress. It is a particular pleasure and honor for me to have an opportunity to contribute to policy making in my own country.

My comments will be directly at HR 2822, the "Temporary Duty Suspension Act." The good sense of the bill seems to me evident, appreciating its logic is hardly more complicated than understanding how foolish it would be to cut off one's nose to spite one's face.

Unilateral liberalization

To begin, I would like to call your attention to the far-reaching reductions of import barriers that developing countries have undertaken in the past two decades. In Chile, for example, tariffs have fallen from an average 35 percent to below 15 percent; in Malaysia from 22 percent to 14 percent. Table 1 in my written text lists some sixteen countries whose tariffs have been reduced by at least one-third.

An important characteristic of these liberalizations is that they have been unilateral. The governments that made the decisions to liberalize realized that some domestic producers would suffer when exposed to import competition, but that the benefits to other domestic interests -- from access to goods at world prices, and from the competitive stimulus to domestic producers -- would be even larger.

These unilateral liberalizations have been extensive. World Bank programs have supported only a part of them, but just this part has been larger than the liberalizations agreed by developing countries at the Uruguay Round. (This is not a criticism of the Uruguay Round. Developing countries were more active bargainers there than any previous round. Bank supported reforms have affected imports of over 500 billion dollars, in 1993 values. At the Uruguay Round, developing countries agreed to tariff reductions that will affect 32 percent or \$393 billion of their total merchandise imports (likewise in 1993 values).¹

Antidumping by developing countries

Liberalization by developing countries is the good news. The bad news is that the countries that are following the lead of the industrialized countries to remove trade restrictions are also following their lead in putting in place new ones. As Figure 1 shows, the number of antidumping actions by developing countries has increased rapidly in the

¹ From 1981, when the World Bank's policy-based lending began, through 1994, the Bank made 238 such loans that supported liberalization of trade policy or foreign exchange policy. These loans, made to 75 different countries, have specified over 2000 trade or foreign exchange policy reforms as conditions for borrowing, and about 80 percent of these reforms have been substantially implemented. These trade reforms were implemented in countries that bought about one-fourth of United States exports -- in dollar value, about \$120 billion in 1993. United States exports to these countries have increased about three times faster to these countries than to countries that have not undertaken such reforms.

1990, until the developing countries' share of antidumping actions is not approximately the same as their share of world trade.

Through June 1994, seven developing countries² have notified antidumping actions to the GATT/WTO, but this figure likely understates the use of antidumping measures by developing countries. Until the WTO Agreement came into effect on January 1, 1995, only signatories of the Tokyo Round antidumping code were obligated to notify their antidumping actions to the GATT, and few developing countries were signatories. As of October 4, 1995, forty-one developing countries had notified the WTO of their antidumping regulations.³

Staving off such backsliding

Sustaining the liberalizations that developing countries have undertaken has been in recent years one of my principal concerns. The job, often, is to talk a government official out of the temptation to take antidumping action. I would like to say that I always succeed, but I do not. There have been instances in which antidumping actions have more or less undone the liberalization that the government had otherwise undertaken. There are however some lessons to be learned from developing countries' experiences and I would like to share a few of them with you.

Several years ago I met with a deputy minister of a small country who described his situation as follows.

"In our country, farmers grow chickens. If you want chicken for dinner, you go to the market and you buy a chicken.

"In the United States, farmers do not grow chickens, they grow chicken parts. Because people in the United States are afraid of cholesterol, they prefer white meat, so it sells at a good price. The legs, the dark meat, they export to our country, at a price lower than what our farmers usually charge for a chicken.

"That's dumping, isn't it, so shouldn't we take action?"

I did not argue that this might be dumping, but suggested that before he took action we should think about the benefits and the costs that such action would bring to his economy. To begin, we split the deputy minister's problem into two, an economic problem -- to determine whether an import restriction was really in national economic interest -- and a political problem -- how to respond to the chicken growers.

Looking at the economic problem, we set out to identify the benefits and the costs to the local economy. The availability of cheaper imports had certainly cost local chicken growers money, but on the other hand, what they were out was approximately what consumers were saving. Those two impacts, at a first approximation, netted out. What consumers were saving by buying cheaper chicken, they were spending overwhelming on other locally produced goods.⁴ Given that what consumers saved by buying cheaper chicken was approximately what the chicken growers were losing, the increased sales by other domestic producers were approximately the net effect of the opportunity to buy cheaper chicken legs.

The economic problem was thus solved -- restricting imports of chicken would hurt some local interests (in total) more than it would help the chicken growers. On the political problem, to avoid making enemies of the chicken growers, I could only wish the

² Brazil, Colombia, India, Korea, Mexico, Poland and Turkey.

³ The WTO agreement requires that all antidumping actions taken after January 1, 1995, be notified to the WTO, but the last time I sought out such information (fall 1995) the WTO Secretariat had not published information on such notifications. The only information I have been able to locate on antidumping actions not reported to GATT (by non-signatories to the Tokyo Round code) is an Argentine Government document reporting that the government of Argentina initiated fifty cases between 1988 and 1994. Over the same period, developing countries reported 229 antidumping initiations to the GATT, 110 of these by Mexico.

⁴ Fortunately a recent consumer expenditure survey was available.

deputy minister good luck. There are other cases however in which the political problem solves itself.

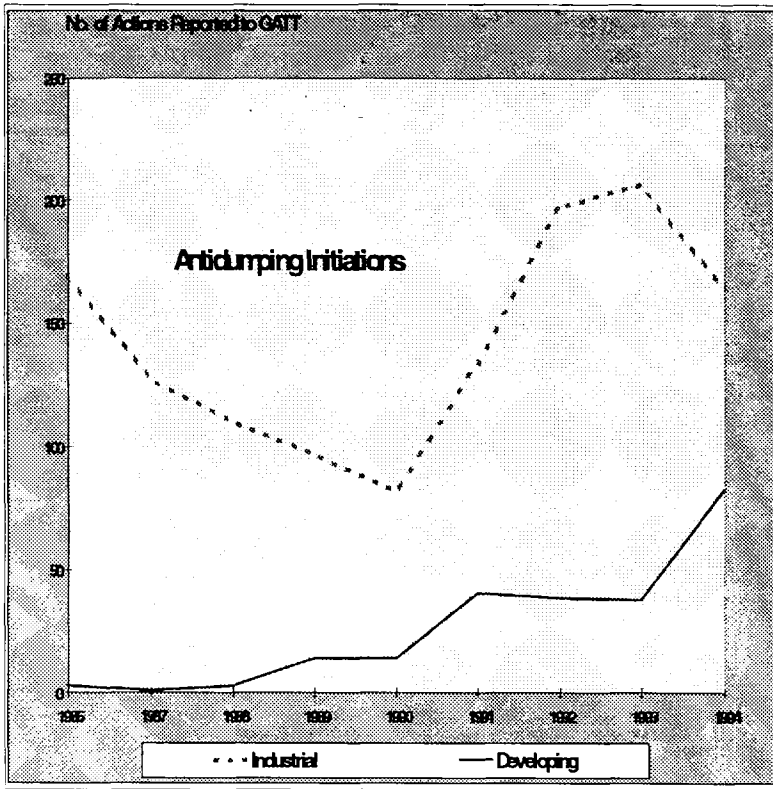
Consider, for example, a recent experience of the Trade Commission of Taiwan. Since 1990, Taiwan has conducted 29 antidumping investigations. Almost all of these investigations concerned imports of industrial inputs such as steel or chemicals. After receiving a set of coordinated petitions from one such industry, the Commission examined the petitions, found them to be complete and the information in them to be accurate. The Taiwan government then imposed a preliminary antidumping duty. User industries complained about the higher costs this imposed on them, and eventually convinced the government that the jobs and output that would be lost by user industries exceeded what would be saved in the industry that had sought protection. The government then lifted the antidumping duty and closed the case.

The sensible procedure that the Taiwan International Trade Commission chose to follow is mandatory for the Argentine International Trade Commission. This commission was created in December 1994 to advise the Minister of the Economy on issues of international trade policy. Among its functions is to conduct, in safeguards and in antidumping cases, an investigation of the impact of imports on the domestic economy -- in GATT language, the "injury" investigation.

In conducting these investigations, the Commission is charged to balance the interests of domestic users of imports against the interests of competing domestic producers. In its reports, the Commission has devoted as much space to the impact of the proposed restriction on domestic users as to "injury" that international competition brings to domestic producers who compete with imports. In some countries such commissions have the discretionary authority to examine how an import restriction would affect user industries, but the Argentine International Trade Commission is the only such agency that is charged to do so.

Lesson

The lesson I want to draw from the three examples I have cited is the obvious one. In countries where trade liberalization has been a process of evaluating the domestic costs and benefits of import restrictions, it is second nature to examine the impact on user industries before imposing a import restriction. Simply put, it makes economic sense to avoid cutting off ones nose to spite ones face. HR 2822 is a step toward such economic sense. If it were enacted, the Commerce department would be in a better position to eliminate antidumping restrictions that do not serve the United States national economic interest -- restrictions that impose costs on some United States industries in excess of the benefits they provide to other United States industries.



Examples of Unilateral Trade Reforms by Developing Countries

Developing Country	(1)	(2) Tariff Rate (%) ⁵		(4)	(5) Tariff Bindings (%) ⁶		(7)
	Reform Year	Before Reform	After Reform	% Change (3)/(2)-1	Pre-UR	Post-UR	Binding Increase (6)-5
Brazil	1988	51	25	-50	16	100	84
Chile	1985	35	15	-57	100	100	-
Argentina	1984	23	12	-48	17	100	83
Colombia	1986	61	27	-55	4	100	96
El Salvador	1987	23	13	-43	98	98	-
Indonesia	1985	37	20	-46	30	93	64
Jamaica	1990	50	20	-60	-	100	100
Korea	1984	24	11	-54	21	83	62
Malaysia	1987	22	14	-36	2	77	76
Mexico	1982	23	13	-43	100	100	-
Peru ⁷	1990	66	16	-75	17	100	83
Philippines	1981	41	25	-39	10	61	51
Turkey ⁷	1983	40	22	-45	36	45	10
Uruguay	1988	29	17	-41	13	100	87
Venezuela	1989	33	16	-51	100	100	-
India	1991	79	53	-33	12	58	47
Sri Lanka	1992	27	26	-4	10	27	17
Thailand	1988	12	9	-25	8	64	57
Tunisia ⁷	1987	33	29	-12	-	68	68
Czech Republic	1989	6	5	-16	96	100	4
Hungary	1990	15	13	-13	87	94	7

Sources: GATT, "Trade Policy Review: Country Report", various issues, 1990-95;
GATT, "List of Liberalization Measures", Note by the Secretariat;
MTN.GNG/MA/W/10/Rev.2, December 14, 1993; and Finger and
Reincke, "Country Tables", World Bank IECIT draft, June 1995

⁵ Simple average of MFN applied tariff levels.

⁶ Percentage of imports bound.

⁷ Included other import duties or surcharges.

Chairman CRANE. Thank you, Dr. Finger.
Mr. Cobb.

**STATEMENT OF JOE COBB, JOHN M. OLIN SENIOR FELLOW IN
POLITICAL ECONOMY, HERITAGE FOUNDATION**

Mr. COBB. Mr. Chairman, thank you for allowing me to appear here today to discuss with you some of the issues involved.

The main theme of my testimony today is that of fairness. This is a term that has come up several times already today, and I want to emphasize the U.S. Government has a primary duty to treat American citizens fairly.

I support the Temporary Duty Suspension Proposal because it will introduce a much larger element of fairness into U.S. trade laws. It will empower the Department of Commerce to treat many more domestic American industries fairly.

Today, the Department of Commerce cannot administer the law from the perspective of America's national economic interest, the economic interest of all Americans. Instead, it has to play the role of Cinderella's stepmother. In that story, you will remember, the lady had two daughters whom she favored and her stepdaughter, poor Cinderella, whom she abused and treated like a household servant.

Oftentimes, many downstream users of products that are in short supply or unavailable in the United States are treated like Cinderella, the abused child.

The problem today is only partly the fault of the Department. The fact is the U.S. trade laws are tilted entirely toward the petitioners who can come and ask the Department of Commerce for protection. Other American industries, which need to import products that may not be available at a specific time in the United States, have no direct basis to ask the Department to help them.

This unlevel playingfield strikes me as perverse. I can understand the argument by a domestic industry that it is facing hard competition from a foreign producer, that the U.S. Government should help American producers. But I cannot understand the argument that says there should not be relief for a domestic industry that is being hurt by an order of the Department of Commerce itself, as in cases where the products are not available from domestic sources.

The rule for helping anyone must start with the premise, "First, do no harm." The Temporary Duty Suspension idea is a way to correct some of the harm the Department occasionally imposes on American companies.

The hard dollars-and-cents issue in considering a Temporary Duty Suspension Act is whether or not the United States is going to remain globally competitive, as more and more of our manufacturing industries become dependent on suppliers from all around the world. If the antidumping laws continue to be the one-sided tool that a few industries can use to get targeted trade protection on demand, other American industries will suffer and will not be able to extend their competitive edge and expand their global market share.

The case of flat panel computer display screens is a recent example of one of America's most significant and competitive industries,

producing laptop computers, placed at a competitive disadvantage because of the Commerce Department's actions on behalf of an antidumping petitioner.

As I have been studying the proposed new regulations of the Department of Commerce, one of the main requirements of both the Uruguay Round Agreement and the Uruguay Round Agreements Act is for "a fair comparison of prices in the domestic and foreign markets."

I believe the proposed regulations of the Department of Commerce are not sufficiently clear and specific about the importance of fairness in the determination of these values and prices. The whole process of determining the prices should not be subject to narrow and often arbitrary factors in cost accounting, but should be looked at from a broad perspective of market conditions and business practices.

The Department's regulations should make the principle of a fair comparison of prices a primary and controlling factor in the Department's enforcement of the antidumping laws.

Another important problem I have noticed in the Department's regulations is the issue of affiliated parties. The statute and the regulations enumerate some specific affiliations, such as brothers and sisters, employers and employees, and so forth, but the proposed regulations are not as tightly drafted as the statute, and the whole issue of "control" as the way in which affiliation is determined is too loose.

Since the issue of affiliation introduces a very murky problem of transfer pricing between two affiliated entities and also the great difficulty of getting information from all of the so-called affiliated sources, it would greatly complicate the Department's enforcement of the laws.

I would strongly urge the definition of control be tightened up and focus on something like ownership.

Economists have a very analytically clear concept of costs and the accounting profession has a very different concept. The allocation of costs between different branches of an affiliated group of producers is potentially a very arbitrary judgment. If the Department leaves the door open for arguments that international corporations with some production outside the United States and some production inside this country are open to arbitrary cost allocation, then there will never be any defense against the claim that imported products are being dumped.

The future of world trade will, I think, turn on whether or not the United States itself adopts the principle of fairness and the fair comparison of prices as the central principle in enforcing our trade laws. Dr. Finger pointed out how the rest of the world is watching and copying the U.S. practices. We need to make our practices such that we will benefit if they are turned against ourselves.

The rest of the world is watching how this government follows the principles of open trade. If it becomes clear these laws are being used as weapons of competition and any petitioner can get the U.S. Government to award a dumping duty, the rest of the world will start to act the same way on behalf of their domestic industries, and American exporters and American workers will be hurt.

The only protection the United States can have against this dark prospect in the future of world trade is to embrace the issues of fairness and transparency here at home and demand every other country follow both the letter and spirit of the Uruguay Round Antidumping Agreement.

We must always remember the real national interest of the United States must satisfy the question, Is something in the national interest of all Americans or is it only in the more narrow interest of some Americans. If the answer is that only some Americans are made better off and that other Americans are made worse off, then the policy really cannot be a question of our national interest at all.

Thank you.

[The prepared statement follows:]

**United States House of Representatives
Committee on Ways and Means
Subcommittee on Trade**

April 23, 1996

Remarks

of

Joe Cobb

**John M. Olin Senior Fellow in Political Economy
THE HERITAGE FOUNDATION
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Mr. Chairman and members of the Subcommittee. Thank you for allowing me to appear here today to discuss with you some of the issues involved in the proposed Commerce Department regulations to implement the Uruguay Round Agreements Act, and to comment on your proposed legislation, the Temporary Duty Suspension Act, H.R. 2822.

I have participated in a number of meetings in the past year as the new rules of the International Trade Commission and the proposed regulations of the Department of Commerce have been discussed. In my remarks today, I am not going to proceed through a section by section analysis of the proposed regulations. I trust that other witnesses here today will address those issues. I will only touch on two very important issues in my remarks:

- (1) the conspicuous absence in the Commerce Department regulations of a requirement that ***a fair comparison of prices*** be made the ***primary consideration*** when the investigations, and the reviews, of export prices and normal values are made by the Department. And –
- (2) the vague way in which ***“affiliated parties” is not clearly defined***. If the Department believes that antidumping investigations and reviews should be conducted more efficiently and with greater transparency (based on genuine market data, not allegations of price and cost data by petitioners), it should give a clear and meaningful definition to “affiliated” parties. The definition ought to be something strict, such as “legal control.”

First, however, I want to make some general observations about the way United States trade laws are administered, and about some of the basic concepts on which those trade laws are based.

What Is In Our National Interest?

When we pose the question, "What is in the National Interest of the United States," we should always put the question in context. Is something in the national interest ***of all Americans***, or is it only in the more narrow interest ***of some Americans***? If the answer is that only some Americans are made better off, and that other Americans are made worse off, then the policy cannot really be a question of the national interest at all.

Unfortunately, in most of the debates about U.S. trade policy, the narrow interests of some Americans are the only criteria that policy makers point to. The costs of a policy to many more numerous other Americans is all too often overlooked. The unfortunate thing about the antidumping law, in particular, is that the interests of an affected domestic industry are all that the Department of Commerce is directed to examine. The interests of other Americans are not part of the process. This is a serious defect in the trade laws.

These other Americans, who have no legal standing in an antidumping case, may have to import products that are not available in the United States in order to meet production schedules or remain competitive in the U.S. export trade against foreign producers. Foreign competitors, outside the United States, will never have to pay antidumping duties, and U.S. companies that need to compete with them must send those jobs outside the United States if our own government imposes antidumping duties on necessary components or materials.

The Issue is Fundamental Fairness

The issue is one of fundamental fairness, by the United States government, to treat all of its citizens — all of its workers and factories — with a fair and equal protection of the laws. The laws should not favor one group of Americans over another group of Americans.

The Temporary Duty Suspension Act, H.R. 2822, introduced by the chairman of this subcommittee on December 21, 1995, is precisely the kind of reform in U.S. trade laws that I am addressing in my description of how the national interest ought to be understood.

The chairman's proposed legislation is tightly structured to give the Department of Commerce the ability to respond to petitions from American industry in cases where today the law does not really allow it to act. The proposal would bring more fairness and balance to the U.S. antidumping laws. Industries that want protection from unfair business practices by foreign producers can make their case, as today, but other American businesses that need to obtain products that are not available in the United States could also get their government to provide them more open access to the world market.

Too often an antidumping order affects a broad category of imports, and the sweeping inclusion of highly specialized imports within the larger category hurts

other American workers and factories. An antidumping order may encompass a product under a general description, when in fact the companies and workers who need to obtain that product to make their own goods have more specific requirements and tolerances than the general description entails. When the Department of Commerce has made such a determination, and the product that is needed is not available in the United States, the domestic industry that is harmed by such a problem should be given relief. Currently the Department does not have sufficient discretion under the law to treat the injured domestic industry fairly.

Some antidumping orders are for the protection of domestic producers that do not maintain continuous production or inventories of the protected items. In those cases, the U.S. government itself is imposing impossibly uneconomical delivery time schedules, or dramatically higher prices, on downstream producers. Again, if the law would only permit the Department of Commerce to entertain petitions from domestic industries that are injured by the Department's own determinations and actions, the U.S. trade laws would be more fair and more clearly directed at the national interest of all Americans.

What could be more logical and fair than to empower the Department of Commerce to grant temporary relief when a domestic industry demonstrates the need for that kind of help from the government? The antidumping laws, in the first place, are based on the premise that some domestic industry needs help from the government because it is being treated unfairly by some foreign producers. But if some domestic industry is being treated unfairly by the Department itself, in an overly broad effort to aid some other domestic producers, then the government should grant relief in those cases. ***The rule for helping anyone must start with the premise, "First, do no harm."*** The Temporary Duty Suspension proposal would give the Commerce Department the ability to minimize any harm in cases where the protected products really are not available in the United States.

The hard dollars-and-cents issue in considering a Temporary Duty Suspension Act is whether or not the United States is going to remain globally competitive, as more and more of our manufacturing industries become dependent on suppliers from all around the world. If the antidumping laws continue to be the one-sided tool that a few industries can use to get targeted trade protection on demand, other American industries will suffer and will not be able to extend their competitive edge and expand their global market share.

The case of flat panel computer display screens is a recent example of one of America's most significant and competitive industries, producing laptop computers, placed at a competitive disadvantage because of the Commerce Department's actions on behalf of an antidumping petitioner.

The risk is too great for Congress to ignore this dangerous trend affecting American industrial competitiveness.

The Fair Comparison of Prices

One of the most serious problems in the administration of the U.S. trade laws has been the way in which prices are compared between the home markets and the U.S. sales price, both in initial determinations and in reviews of antidumping orders. Since the entire antidumping case often revolves around these pricing and constructed cost determinations, and the size of the antidumping duties are based on these administrative determinations, the Uruguay Round specifically prescribed, in Article 2.4 of the Antidumping Agreement:

A fair comparison shall be made between the export price and the normal value.

The same principle was reinforced, in identical words, by Congress in the Uruguay Round Agreements Act, 19 U.S.C. § 1677(b)(a):

A fair comparison shall be made between the export price or constructed export price and normal value

I believe ***the proposed regulations of the Department of Commerce are not sufficiently clear and specific about the importance of fairness*** in the determination of these values and prices. The whole process of determining the prices should not be subject to narrow and often arbitrary factors in cost accounting, but should be looked at from a broad perspective of market conditions and business practices. Specifically, the enumeration of some factors in price and value determination in 19 U.S.C. § 1677(b)(a)(1)-(8) should not be construed to exclude other issues and considerations in making a fair comparison. The Commerce Department regulations should make this clear.

What, Exactly, is an "Affiliated Party"?

The proposed Department of Commerce regulations are not as specific in defining the concept of "affiliated persons; affiliated parties" as the statute itself, and this ambiguity should be fixed. The Uruguay Round Agreements Act defines affiliation of business entities in terms of "legal or operational" control of one business over another. The statute gives five different types of relationship that clearly meet the test, 19 U.S.C. § 771(33)(A)-(E), but the regulations do not provide any suggestion of how the Department would determine "affiliation" in cases that are not spelled out in the statute. The definition of "control" needs to be clarified as the legal right to exercise restraint or direction over the other party.

I strongly urge that the Commerce Department regulations specifically follow the intent of the statute, as well as the letter of its law in the five cases, by including a general rule based on the definition of "control" that is found in the statute itself: "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." [section 773(33)] The concept of affiliated parties and control

should be as specific as possible because the determination of prices depends on the drawing of these lines.

The murkiest and most arbitrary area of cost accounting is in transfer pricing — when goods (or services) are delivered from one part of a company to another, how does each part of the company put a “price” on the transfer? This is not a problem if two companies are independent and not under some common legal or operational control — if they are not “affiliated.” The price is determined in a way that must be economically profitable to both sides, because it is voluntary. This is a market price, even if some accountant might think all of the “costs of production” are not covered.

Unfortunately, the rules of accounting cannot look at the concept of economic cost, because the accounting profession requires every value to be based on historical costs and on documentation of outlays, not on **prospective market values** as in economics. In economics, the definition of **cost** is “Whatever you have to give up to get what you want.” You give up money at the grocery store to obtain meat, vegetables, and canned goods. But the real cost of your groceries is not the money itself, but all of the other possible uses of your money. In manufacturing, the cost of producing one kind of product is the market value (to the buyer) of the other kinds of products you might have produced instead.

“Affiliation” Can Destroy the Rule of Law

Whenever an antidumping case involves an “affiliated party,” the transfer pricing issues and the cost accounting issues are going to determine the outcome of the case. Market prices will not play a significant role because the Department’s investigation, and the allegations of the petitioners, will have to develop accounting records and arguments about shared costs and allocating overhead costs and dozens of other mind dulling calculations. **The outcome of each case will become essentially arbitrary**, and not based on economics or even on the real world at all. There will be no “rule of law.”

Under the concept of “dumping,” the accountant is asked to determine a whole range of issues about the “fair value” of a product in the market. But the science of economics does not recognize the concept of “fair value.” The value of any product or service in the market is only what the buyer places on it. If someone produces something, regardless of the cost of production, and there is no buyer, no one can say it has a “value” that is equal to its cost of production. Indeed, even the producer starts to regret owning the thing and will try to find some way to liquidate his inventory and find some way to recover part of the costs.

Unfortunately, the procedures for constructing a value to determine whether “dumping” exists is essentially an accounting exercise. The antidumping laws cannot get away from the rules of the accountants, but the Department’s regulations ought to be written and administered in a way to reduce the role of the accountants. Narrowing the legal definition of “affiliation” will help.

The Future of World Trade

The issues in both the Commerce Department's regulations to implement the Uruguay Round Agreements Act and the chairman's Temporary Duty Suspension Act are far more important than most Members of Congress may realize. How the United States government writes its regulations and conducts its investigations under the antidumping law will set the standard of behavior for every other country in the world. Back in 1980, only about 10 countries had antidumping laws like the United States, but today there are about 40 countries. In those countries, the primary target of antidumping cases have been U.S. exporters.

Most Members of Congress may think the antidumping laws are primarily for the benefit and protection of American domestic industries from unfair foreign competition. That is the stated purpose of the statutes. But most Members of Congress are also aware that the trade laws are even more technical and hard to understand than the Federal income tax code. Indeed, Congress is debating the popular proposal to repeal the Federal income tax code. But no one is thinking about repealing the far more arbitrary and obscure trade laws.

There is a disturbing tendency in the practice of antidumping law for the laws themselves to become weapons of competition, rather than a genuine attempt to search for and enforce fairness in business practices. A domestic producer can bring an antidumping case as a way to impose higher marketing costs on a potential competitor. Whether in the United States or in a foreign country where a U.S. producer might want to introduce his products, the filing of an antidumping case can make the entire business plan unprofitable to the new international trader.

My friends at the International Trade Commission have told me of a number of cases where an antidumping action was brought and the respondent company chose not to hire lawyers and fight the case but rather it simply stopped selling its products to Americans in the United States. U.S. companies that needed the products relocated their manufacturing operations to places outside the United States and kept right on producing for the world market. American consumers were denied the benefits of competition from the imported items.

The real losers in those cases are Americans. The products of those American companies that went overseas, to be able to get what they need to be competitive and avoid the antidumping problem, are not counted as U.S. exports, and not manufactured by U.S. workers. The products may have familiar U.S. labels and corporate identifications, but they are exports from some third country to some fourth country.

The same practice of using the antidumping laws as a weapon of competition is happening with increasing frequency in other countries. The recent case of steel pipes used in drilling oil wells, which was the subject of antidumping cases in both the United States and Mexico, each country's industry accusing the other of "dumping" the same product. If a foreign country's market represents a small part of an American exporter's world market and the domestic industry

competing in that country's market chooses to invoke "antidumping," the American company might decide not to bother with sales there.

Companies will choose to enter a country's market or to avoid it on the basis of costs and profit opportunities. If more and more foreign markets become closed to American exporters, not because of any formal trade barriers but only because the Americans decide there is no profit in a market when they have to add the costs of fighting antidumping cases — of hiring lawyers in each of those countries and litigating before whatever agency performs the kind of work for which we have the Commerce Department and International Trade Commission.

The bottom line is that antidumping is a game that everybody can play, and the more it is seen that the United States allows its trade laws to be used as a weapon of competition, or as a vehicle for protection, the rest of the world will retaliate against American exporters in a competitive "turn about is fair play."

The United States Trade Representative would have nothing to negotiate with the Trade Minister of such closed markets, because the market are "open" except for the threat of expensive litigation by those countries' domestic industries.

The only protection the United States can have against this dark prospect in the future of world trade is ***to embrace the issues of fairness and transparency here at home***, and to demand that every other country follow both the letter and spirit of the Uruguay Round Antidumping Agreement.

And we must always remember that the real national interest of the United States must satisfy the question: Is something in the national interest ***of all Americans***, or is it only in the more narrow interest ***of some Americans***? If the answer is that only some Americans are made better off, and that other Americans are made worse off, then the policy cannot really be a question of our national interest at all.

Thank you, Mr. Chairman. I will be happy to answer any questions you may have.

Chairman CRANE. Thank you. I have a question I would like to direct to both of you, and that is, If we give the agencies authority to suspend duties temporarily, under what circumstances do you think it is appropriate to use that authority?

Mr. COBB. Mr. Chairman, in the first place, one thing I like very much about your bill is that the Department of Commerce would actually look at the facts of the petitioning industry, petitioning in this case for a temporary suspension. So the petitioner would have to make the arguments that, in fact, it faces a genuine short supply of genuine specialty products that are covered under too broad a dumping order and, if the facts are going to help the production and competitiveness of that industry, that should take care of some of the concerns the other gentleman raised earlier that it might be used as a weapon simply to undermine the dumping laws. I think it is a very well-drawn bill.

Chairman CRANE. Dr. Finger.

Mr. FINGER. Thank you. I would like to affirm Mr. Cobb's point that the advantages, from my perspective of the bill, is that it specifies, with some precision, circumstances under which an exception would be made. Part of the problem in the countries I worked with is that governments are used to operating with a considerable degree of discretionary authority, which has often led them into the problems they now have, having used it in the wrong direction. So the fact the bill is well drawn and lists specific circumstances in which reasonable people can judge are they or are they not met, is, again, an example of the procedural advantages of doing things the way things are typically done in the United States. Since I am not working for the World Bank today, I can praise the United States. [Laughter.]

Chairman CRANE. Thank you.

Mr. Rangel.

Mr. RANGEL. Do either one of you think the United States would be better off without any of these antidumping provisions?

Mr. COBB. You are asking an abstract philosophical question?

Mr. RANGEL. Yes.

Mr. COBB. I think, if the World Trade Organization would adopt a competition policy that would apply to all WTO members, it would be preferable for all countries to go to a common standard of competition policy. In that case, I would recommend we repeal the antidumping laws. I can see cases in which they have been carried or executed or interpreted in a way that I think is wrong. There are other cases in which I can actually see the reasons why the domestic industry came and sought relief. I would prefer to see the safeguards of section 201 used more commonly because that is actually designed as part of the GATT as a way to allow an industry to adjust to sudden new competition.

I think antidumping is possibly too easy to trigger. But, in terms of the basic concept, remember, antidumping came from the original idea under the antitrust laws that you could have a predatory price attack on an industry driving it out of business.

Economists who have looked at the history of industries have found such an incredibly rare occurrence of that kind of business tactic that it calls into question whether it ever really existed.

Mr. FINGER. Mr. Rangel, you have asked a question which I am asked quite often, usually with a different country's name in it, and I usually finesse the question.

What we try to emphasize isn't a matter of abolishing or not abolishing the dumping examination, but adding to it a sensible examination of the impact of the proposed restriction on the domestic economy. We try, at the World Bank, to guide countries toward doing a good job of evaluating how the national interest of their economy would be affected by the proposed restriction. We urge them to take into account users, how costs would be imposed on them if the restriction were imposed, at the same time to take into account the interest of producers who are asking for relief from import competition. On the basis of the net impact on the domestic economy, we hope they will quite frequently reach a decision which will sustain their liberalization movement. The dumping part of it we usually try not to speak to.

Chairman CRANE. Thank you.

Mr. Houghton.

Mr. HOUGHTON. Thank you, Mr. Chairman. Thank you, gentlemen. Good to listen to you.

Mr. Cobb, the last page of your testimony or maybe it is the second-to-the-last page, you say this: "We must always remember that the real interest of the United States must satisfy the question, 'Is something in the national interest of all Americans or is it only in the more narrow interest of some Americans?'"

Now, let me describe a situation. I am "some" American, and I am interested in preserving my job, feeding my family, and being a member of the community. And all of a sudden I find out over a series of years that not only my job, but my company and the whole industry is obliterated by dumping practices. It is only one industry. There may be only three or four companies in it, but that is "some" Americans. You know, some Americans are pretty important to me, and I would imagine they would be pretty important if you were one of that group. How do you answer that question?

Mr. COBB. We need to consider the concept of the national interest. Obviously, in a free market economy, in a competitive economy, you have industries that go down and other industries that prosper. Change occurs. Now you stipulated this was due to dumping, due, in particular, to selling below fair value in the U.S. market.

Mr. HOUGHTON. And unable to penetrate the other market.

Mr. COBB. Most declines in American industry occur because of competition within the United States. The vast bulk of all change that occurs in our economy occurs because of other industries inside the United States.

Mr. HOUGHTON. No. That is not right. That is not right because there are conditions—it is half the way—that sometimes it happens within the United States, but the U.S. companies, in any attempt to get back, cannot penetrate the other market of the company in which it exists in order to protect its own base.

Mr. COBB. I don't think that penetrating the other market is the way in which an industry that has a competitive disadvantage would get back. If we look at the most famous case during the Reagan administration of a company that was faced with this kind of challenge, Harley Davidson—and we need to remember that was

a section 201 case, not a dumping case—and it came back because it faced the challenge and corrected itself.

In the steel industry, I think it was very interesting to observe that, of course, the steel industry is very active in the use of anti-dumping cases. What is happening in the steel industry is domestic producers, Nucor and Chaparral, in particular, are taking huge amounts of market share away in the manufacturing of products that are otherwise protected by dumping orders sought by other larger, older steel companies.

This is a very interesting process. Once you raise the price above where the technology exists by some means, some artificial means, like an antidumping order, you open up for others domestically to come in behind you and catch up and make up that loss.

The dumping orders are not, in fact, doing a favor to the companies that petition for them. Too often, it is, in fact, simply giving them a stop gap, and they would be much wiser to go section 201.

Mr. HOUGHTON. Well, you know a lot about this, and you are much more versed in the whole economic structure of the United States and the world, I suppose, than I am, but I do know an industry or two, specifically, where they were driven out of business, every single last company, and one of the reasons is products were dumped in this country. They were unable to penetrate the other country and, if they had been, the products would not have been dumped because they would not have been able to uphold those lower prices because their own market was being attacked.

I think this is the thing I worry about, and maybe both you gentlemen understand this, that it is not that we are trying to be uncompetitive, but we are trying to protect the good companies, the good people, the good technologies who have no place to go if they are being attacked here and cannot attack the home base of the other company or industry that is putting them out of business. That is the problem, and maybe you have got a better solution for it.

Mr. COBB. Sir, I am not familiar with the facts of the industry you are referring to. First, you haven't named it, and I am not asking you to, but it seems to me we need to know the conditions of pricing and how fixed costs and variable costs are used by a marketing manager. In many cases, it is sensible, extremely smart, and not at all unfair for a manufacturer that needs to increase sales temporarily or needs to sustain a sales level temporarily to offer discounts. Every single time any one of the U.S. "Big Three" auto companies is reported on a quarterly basis as losing money, that is an example of a time in which they are not covering their fixed costs. And if they were trying to sell their cars during that period of time across an international border, the other country could say, "Ha, you are dumping." Every time you are offered a consumer rebate or a concessionary interest rate to finance the purchase of an automobile, the manufacturer, in theory, is not recovering his costs, his fixed costs. In theory, he is dumping on you, to your advantage at that moment.

The pricing and the marketing of products is an extremely versatile and nuanced thing that economists study. Regrettably, the way the antidumping laws require the Department of Commerce to investigate the issue of fair value versus export price is such that all

of these genuine business practices just get washed away and lost in a dark hole of cost accounting rules and cost accounting judgments. And, if you talk to any professional cost accountant who works for a large corporation with many branch facilities where products have to be transferred back and forth, you will realize how incredibly judgmental and arbitrary, often arbitrary, are the transfer prices inside a corporation.

When this now becomes a matter of law and the Department of Commerce is going to say a dumping margin exists because of one of those judgments, there is no rule of law there at all. It is just arbitrary.

Mr. HOUGHTON. Thank you, Mr. Chairman.

Chairman CRANE. Mr. Hancock.

Mr. HANCOCK. I don't have any questions, Mr. Chairman.

Chairman CRANE. If not, let me thank you, Dr. Finger, and also, Mr. Cobb, for your testimony this morning. We appreciate input always. So keep it coming.

Our next panel is made up of representatives from various U.S. industries engaged in exporting and who purchase inputs for use in U.S. manufacturing operations. William M. Hickey, Jr., president of Lapham-Hickey Steel Corp., and chairman of the board of the Steel Service Center Institute; Joseph Tasker, Jr., vice president and assistant general counsel at Compaq Computer Corp.; Charles K. Dorland, consultant to Enron Corp.; Jim Morton, vice president of Government Relations, Michelin North America; and Edward J. Black, chairman of the Pro Trade Group and president of the Computer and Communications Industry Association, who is accompanied by Bruce Aitken, of the law firm of Aitken, Irvin, Lewin, Berlin, Vrooman & Cohn, LLP; and by Peter Suchman, of the law firm of Powell, Goldstein, Frazer & Murphy.

And, after you gentlemen get seated, we will get started in the order I introduced you. And all statements, let me remind you, again, any printed statements will be made a part of the permanent record, so you can condense your presentations.

STATEMENT OF WILLIAM M. HICKEY, JR., PRESIDENT, LAPHAM-HICKEY STEEL CORP., CHICAGO, ILLINOIS; AND CHAIRMAN OF THE BOARD, STEEL SERVICE CENTER INSTITUTE

Mr. HICKEY. Good afternoon, Mr. Chairman and Members of the Subcommittee. I am Bill Hickey. I am president of Lapham-Hickey Steel Corp. in Chicago. I am currently the chairman of SSCI, the Steel Service Center Institute. The SSCI appreciates the opportunity to address the Subcommittee today, and I will summarize my statement and would appreciate the full text of it being included in the record.

Steel Service Centers perform a vital role in the economy by purchasing, processing, and delivering steel and other materials needed to keep the millions of American workers in the metal-working industry competitive. On behalf of our 350 U.S. members and their 300,000 customers, many of them small businesses, I would like to address a deficiency in America's trade law.

SSCI is a strong supporter of effective remedies against unfair trade practices. We must be, as our members immediately feel the

effects of unfairly imported steel on their balance sheets, since we carry a collective 7 million tons of steel on a given day, and all of this has been bought and paid for.

While ensuring industries get effective relief, this country also needs to avoid the unintentioned consequences of driving business from our borders. When a product cannot be supplied by a domestic producer, there is no logic, no necessity, and certainly no justification to impose prohibitive antidumping and countervailing duties. To remedy this problem, SSCI supports the thrust of H.R. 2822.

Let me make three points with respect to this legislation. First, contrary to assertions by some opponents of this bill, there is a real problem. Shortages do exist, and they can crop up suddenly and unexpectedly. In the steel sector, it is a matter of simple arithmetic. Apparent U.S. steel consumption is running at approximately 110 million tons. The domestic producers shipped nearly 97 million tons in 1995 with the industry operating at capacity. Seven million tons of this production were exported in 1995, which left 90 million tons of available domestically produced steel for domestic consumption. Therefore, there was a shortfall of almost 20 million tons of steel. This had to be made up by imports.

Without imports to fill the gap between demand in domestic supply, this country's manufacturing base, employment, and exports would fall.

SSCI is currently undertaking a system to inventory the products that our members have been unable to purchase in recent years. The final results will not be available for a few more weeks. However, we have attached to our full statement a preliminary list of specific products that the first tier of respondents have indicated they have been unable to secure from a domestic supplier. I think the Assistant Secretary mentioned these.

Second, our critics argue that remedies exist under current law. In practice, there is no doubt the Department of Commerce routinely includes products not made in the United States in their antidumping and countervailing duty investigations. Moreover, when shortages arise, there is no recognized way for a buyer to get prompt or adequate relief. In any event, the only steps the Department has been willing to take involve a permanent revocation of that particular product from the order, and that is only after the petitioning industry unanimously has endorsed such an action.

This would be the wrong remedy when a shortage is only temporary. Critics who insist on such a remedy argue against their own interests.

Third, while H.R. 2822 represents a giant step forward toward addressing this problem, as written, it lacks the degree of specificity that our members would prefer. In our prepared statement, SSCI outlines the five core principles that are necessary to ensure a temporary duty suspension mechanism works fairly for all parties. These five principles are: It must be temporary; it must be targeted on the unmet need documented by the petitioner; it must be transparent, so that all parties have an opportunity to comment before the decision is taken; it must be timely to prevent manufacturers from deciding to import further process goods instead of performing these functions here; and it should be a tested procedure,

such as that that was established under Public Law 101-221 for the steel voluntary restraint program between 1989 and 1992.

Mr. Chairman, this debate should not be about whether steel shortages exist. They do. Nor should the debate be about whether the current system provides a remedy to shortages. It does not. Rather, the debate should be about how to develop a system that provides relief to downstream manufacturers without detracting from the relief to the petitioning industries, a system that strengthens rather than weakens U.S. trade law, and a system that is user friendly to the affected industries, rather than only their lawyers.

I hope this hearing will serve as a catalyst for that debate because, once it begins, we believe a solution to this problem can be developed that is workable for all segments of the U.S. manufacturing community.

That concludes my remarks. I would be happy to take any questions. Thank you.

[The prepared statement and attachments follow:]

STATEMENT OF WILLIAM M. HICKEY, JR.,
CHAIRMAN OF THE BOARD OF DIRECTORS
THE STEEL SERVICE CENTER INSTITUTE
BEFORE THE TRADE SUBCOMMITTEE
COMMITTEE ON WAYS AND MEANS
U. S. HOUSE OF REPRESENTATIVES
APRIL 23, 1996

Good morning. My name is William Hickey. I am President of Lapham-Hickey Steel Corp. of Chicago, Illinois. These comments are submitted on behalf of the Steel Service Center Institute (SSCI), a trade association representing about 350 companies that process and distribute \$25 billion of steel products through 975 plants across the United States. SSCI companies employ approximately 100,000 workers and supply the metal needs of 300,000 end users. Our members operate in 296 Congressional districts in 49 states.

Service centers are a vital link in the thin line of supply between steel mills and their ultimate customers. Many service centers, like the customers they supply, are small businesses. Among other functions, our members aggregate small orders that steel mills otherwise might refuse as uneconomical. Our members flatten, cut, shear, punch, burn and perform other preproduction processing so that the customer gets exactly the right steel for each particular end-use. They maintain about seven million tons of inventory and deliver, often on a just-in-time basis, to job sites and manufacturing plants all across our Nation. Without service centers, the American manufacturing economy would be less efficient and less capable to compete in the ever-expanding international marketplace.

However valuable the service provided by SSCI member companies, it is for naught when steel is not available on timely and competitive terms. That is why SSCI has worked since 1988 to ensure that America's steel trade policy had a workable short supply mechanism in place. To that end, SSCI is a member of the Temporary Duty Suspension Group and supports the comments the Group submitted to the Ways and Means Committee on H.R. 2822 on March 1.

SSCI is grateful for this opportunity to testify on H.R. 2822. Before commenting on the bill itself, SSCI wishes to state for the record its support for effective trade laws. **SSCI in no way seeks to weaken the trade laws or the remedies available under them.** On the contrary, service centers are normally the first to feel the adverse effects of dumped and subsidized imports. Having already bought and paid for their inventories, any drop in the market price has an immediate and direct impact on SSCI members' balance sheets. Thus, for purely economic reasons, service centers want to see the integrity of our trade laws maintained. Like the domestic mills that supply us, we have always supported strong U.S. trade laws and will continue to do so.

As a general proposition, SSCI believes that antidumping authorities tend to underestimate the cost and complexity of the systems they administer. In the United States as elsewhere, the procedures favor petitioners over respondents and large companies over small ones. Service centers are rarely qualified as "interested parties" in Commerce Department proceedings. However, we do participate actively in the injury investigations conducted by the U.S. International Trade Commission. Those proceedings, while sometimes burdensome, usually succeed in developing a comprehensive factual basis for decision-making by the commissioners.

While our members have had little direct involvement in Commerce Department proceedings, they have from time-to-time been involved as respondents in complaints brought by other countries, most notably Canada. Our experience with Canadian antidumping proceedings should sound a cautionary note for the Subcommittee. Normally, service centers ship in small quantities. When an investigation covers a large quantity of small transactions, the legal and administrative costs of defending oneself become prohibitive. Typically, our members see no choice but to decline to respond to Canadian questionnaires. In such cases, the antidumping authorities resort to "best information available," producing extremely high duty rates that bear no relationship to commercial realities and can exclude service centers from the export trade.

We raise this point as a contribution to the discussion of what constitutes "simplification." The Department of Commerce is to be commended for its efforts to streamline the amazingly complex system we use in this country to determine the existence and size of dumping margins. Streamlined

regulations and questionnaires are helpful. Such simplification is a worthy objective, but it is not enough to ensure a fair system. More fundamentally, what we really should aim at -- in this country as well as in our trading partners -- is a system that offers all petitioners and all respondents, regardless of their size and legal resources, a fair chance to be judged on the merits of their true situation.

We urge the Subcommittee to make equitable access to the antidumping and countervailing duty process the central goal of American administration of the trade laws. In its continuing oversight of these statutes, we hope the Subcommittee will seek the views of all affected industries, without regard to their technical status as "interested parties."

Turning to the issue of H.R. 2822, we wish to commend the Chairman for introducing this legislation. The bill calls attention to a major deficiency in the trade laws and proposes a simple remedy that would ensure adequate supply downstream manufacturers (our customers) without reducing the effectiveness of the remedy that is due to injured domestic petitioners.

Due to our unique position within the steel distribution chain, we also recognize in an ever-expanding global economy, the legitimate needs of steel processors, fabricators, manufacturers and other end-users must also be safeguarded. If we fail to act accordingly, we should not be surprised to see one manufacturing operation after another shrink or close as foreign components replace American components in our manufacturing processes. The mission of service centers is to ensure their customers with competitive supply so that the U.S. manufacturing base can not only be maintained, but also can expand to meet future demand in the global economy. We consider this to be a commercial and moral obligation to our workers, our communities, and those of our customers who depend upon us.

For those of us in the steel sector, this is more than an academic issue. America has not been self-sufficient in steel for a long time. Despite the on-going additions to capacity, this is still true. In fact, in terms of overall tonnage, we consume substantially more than we produce. Using 1995 data, the shortfall can be estimated at approximately 19 million tons:

Total Domestic Shipments	=	97 million tons
Less: Exports	=	7 million tons
Equals: Domestic Shipments	=	90 million tons
Versus: Consumption	at	109 million tons

Of course, the real story is not in the gross tonnages but in the specific products that are needed for the precise application of the manufacturer or end-user. Steel simply is not fungible; you cannot build a bridge with automotive sheet, nor hoist an elevator with cable made welding quality wire rod. Every end-use has its own requirements. From the stand point of the steel mill, a ton of product is a ton of product; their limit is the production capacity they possess. From the point of view of the downstream manufacturer, only steel with the right specifications is acceptable; their limit is the availability of that product from domestic and foreign suppliers.

SSCI is in the process of polling its members to determine the extent to which domestic supply is inadequate to meet current demand. The results will not be complete for several weeks. Attachment One summarizes the initial responses from only a few members. Even this partial response should be enough to demonstrate that the problem for downstream manufacturers is real.

Almost by definition, most situations of "no availability" or "no commercial availability" (we urge that these terms be used instead of the misleading "short supply") involve tonnages that from the mill perspective are *de minimis*. From the perspective of the downstream manufacturer, the lack of the precise material required, no matter how small the volume, is a matter of life and death. If the needed material is not available on commercially realistic terms, he must decide whether to shift some portion of his processing outside the U.S. border in order to continue to compete.

SSCI supports H.R. 2822 because it would provide a means to avoid having temporary shortages lead to permanent losses to our manufacturing base. While we consider the legislation to be a valuable starting point, several changes in the language are needed in order for H.R. 2822 to be workable and acceptable to service centers and their suppliers. We urge the Subcommittee to address the following five principles as it considers revisions to the wording of H.R. 2822.

For service centers (as for the mills that supply us), it is essential that any "short supply" solution not lead to excess supply in the marketplace since we both have the same commercial interests at heart. To be acceptable and workable, any short supply mechanism considered by the Subcommittee should rest on the five principles described below.

Temporary

Any short supply mechanism should be predicated on the temporary suspension of antidumping and countervailing duties. There are certainly some products and some particular forms of products that are not and never have been produced in the United States. They should be excluded from the scope of antidumping and countervailing proceedings but rarely are. There are many reasons for this, including: a lack of awareness by end-users (particularly by smaller companies) of the inclusion of particular products within broadly defined products under investigation; the prohibitively high cost of legal services relative to the small value of the products involved; and, a scarcity of positive precedents.

For these reasons, existing statutory authority rarely provides adequate and timely relief for products not manufactured in this country. Moreover, domestic supply is not fixed in a static way but responds to changes in the market. Normally, a petitioner is able to point to unused capacity in its industry as one indicator of injury. In such circumstances, mills tend to be more willing and able to accommodate the special needs of smaller customers. However, as supply tightens (as normally happens after the imposition of dumping and countervailing duties), the situation often changes dramatically and with little notice. Acting with full economic rationality, mills frequently concentrate on higher-value or higher profit items and shun lower-value or lower profit products.

Thus, a product that was in ample supply at the time dumping and countervailing duties were imposed may turn out to be unavailable in sufficient quantities in some future period. What, then, are downstream manufacturers to do? Wait for months or years until the supply/demand balance shifts and the mills are again willing and able to supply the needed input? In a competitive global economy like ours, that is often not an option. More likely, the downstream manufacturer will consider importing a more elaborated component or even moving his operation across the U.S. border to be able to continue to meet previously negotiated contractual obligations and avoid ceding the market to other offshore competitors.

Surely, a temporary problem demands a temporary solution. A short supply escape valve should work two ways: it should be turned on when needed and turned off as soon as it is not. Currently, there is no way to do this under existing law.

Targeted

A second principle for short supply is that relief must be targeted on the unmet need documented by the petitioner. It should meet the needs that otherwise cannot be met and no more. Just as a deficient remedy leads to the flight of facilities and perhaps entire plants or their replacement by imports, an excessive remedy will lead to too much supply and an erosion of the domestic pricing structure. Both extremes are to be avoided.

How to do this? While not spelled out in the current text of H.R. 2822, the administering authority of the law should require each short supply petitioner to document his precise needs (whether it be in tons, pounds, or whatever appropriate unit). In addition, the petitioner should be required to show that all attempts to secure a domestic supply of the product in question have proved fruitless. Under the legislation, the administering authority would have the discretion to turn down requests that are unfounded and exaggerated. In addition, duty suspension on the product in need would be limited to precisely the quantity that has been shown by the petitioner to be unmet and no more. This will eliminate the potential for most abuses.

Transparent

A workable short supply system must be transparent. A mechanism cannot work well in the absence of complete and valid information. A simple way to ensure this is to publish notices regarding each request for a temporary duty suspension in the Federal Register and to invite comments on the petition from the public.

In this way, any potential producer (even if previously unknown to the petitioner) and any holder of inventory can step forward to meet the need of the petitioner. If that happens, there is no need for a temporary suspension of duties.

Timely

The essence of short supply is urgency. A procedure that is not available for years after the imposition of dumping and countervailing duties or that takes untold months to complete is the antithesis of a short supply remedy. If the aim is to ensure that American downstream manufacturers do not needlessly lose business to foreign competitors, timeliness is essential.

Tested

Judging from the protestations of some opponents of any short supply provision, it is surprising that Congress has provided the Federal Government similar relief, particularly when it relates to the procurement of domestic materials used in federally-funded construction or national security programs. Year-after-year, Congress considers numerous domestic preference proposals (particularly in appropriations legislation) designed to support and maintain the U.S. industrial base. However, in most instances, Congress is careful to protect the interests of the Federal Government when such materials become in short supply. Incorporated in many of these domestic preference proposals is a clause which, in part, waives the domestic preference requirement when domestic items to be procured are not produced in sufficient and reasonably available quantities of a satisfactory quality. (See Attachment Two for a partial list of domestic preference waivers relating to certain steel products).

Perhaps the most elaborate test of a short supply mechanism, however, was that mandated by the Congress in 1989 as part of the Steel Trade Liberalization Program Implementation Act (P.L. 101-221). (A copy of Section 4(b) of the Act is included as Attachment Three). This legislation passed the House of Representatives by a vote of 354 - 10, and later the Senate by voice vote. The experience under that program may be highly instructive for the designers of any temporary duty suspension program. From October 1989 until the Voluntary Restraint Agreement (VRA) program expired in March 1992, the U.S. Department of Commerce considered 60 claims of short supply, approving 51.

Following are some salient considerations regarding the VRA program:

- More than half of the extra licenses authorized on grounds of short supply were granted to the steel mills themselves.
- The average award for finished steel products was 7,707 tons. Interestingly, the tons per award average trended downward from year-to-year. By the third year it was only 292 tons per grant.
- Every one of these decisions was made within the 30 - 60 day time limit established by the statute.
- The Department of Commerce administered this provision of the law with only minimal staffing.

In other words, the VRA experience clearly demonstrates that a short supply mechanism is feasible and that it can be done in such a way as to avoid undermining the effectiveness of the remedy. The VRA program embodied the principles of **temporary, targeted, transparent, and timely**. That is why it worked so well. The Congress now should transport those same principles into the antidumping and countervailing duty laws.

Conclusion

Our customers, America's downstream manufacturers, are just one component away from disaster. If any single item becomes unavailable when needed in the right quantities and the right qualities, then the manufacturer cannot ship his automobile, locomotive, computer, airplane, or any other product. However mundane the missing piece, whether it be an ashtray in a car, a tiny metal part of a spark plug, or a small bearing, its unavailability can bring the manufacturing process to a sudden halt and cripple sales.

The threat of domestic product shortages is real. No one is more acutely aware of the impact non-availability of domestic materials can have production schedules than the U.S. Government. For years, Congress has safeguarded the interests of the Federal Government when adopting domestic preference legislation by including a series of short supply relief mechanisms. In almost every instance, domestic preference requirements legislated by the Congress can be waived when the product in question is not produced domestically *in sufficient and reasonably available quantities of satisfactory quality*.

For reasons stated above, SSCI commends the Chairman for his initiative in introducing H.R. 2822. We urge the Subcommittee to explore modifications to the bill to ensure that a temporary duty suspension mechanism could be used but not abused. SSCI looks forward to the

day when American steel fabricators and end-users will no longer have to sacrifice long-term production in this country because of temporary shortages of their raw materials.

Recognizing the fact that periods of product non-availability do occur, Congress should act now to protect the interests of, and job opportunities afforded by, downstream manufacturers by crafting a tested fix to this flaw in U.S. trade law.

**SELECTED STEEL PRODUCTS
EITHER NOT PRODUCED DOMESTICALLY
OR IN LIMITED QUANTITIES
WHICH HAVE RESULTED IN PERIODIC SHORTAGES**

10ga, 84 Wide Hot Rolled Sheet

14ga, 72 Wide Hot Rolled Sheet

7 @ 15.3 I Beams

7 @ 20 I Beams

S15 - S24 I Beams

5" 19# Wide Flange Beams

5" 16# Wide Flange Beams

MC6 & MC8

14 ga Floor Plate

1/8 x 1/2 Hot Rolled Strip

1/8 x 3/4 Hot Rolled Strip

3/16 x 3/4 Hot Rolled Strip

3/16 x 1/2 Hot Rolled Strip

1 x 1/2 x 1/8 Bar Channel

1-1/4 x 1/2 x 1/8 Bar Channel

1-1/4 x 9/16 x 3/16 Bar Channel

1/4 x 1/2 Hot Rolled Flat

1/2 x 3/4 x 1/8 x 20' Hot Rolled Angle

3/4 x 3/4 x 1/8 x 20" Hot Rolled Angle

1/4 x 3/8 Flats

20 x 4 x 1/2 Rectangular Tube

Galvanealed A40 CQ .097 x 72 x Coil

Galvanealed G90 .176 x 48 x Coil

Galvanized G60 & G90 .016 x 52 Coil Paintline Quality for Continuous Coil Coating

Hot Rolled Coil 100,000 p.s.i. minimum yield strength in a width range of 36" through 60", thickness of .118 through .312

Hot Rolled CQ or A607 Grade 50 (Floor Plate Coils)

Sound Dampening Material - *Sol Comfort*
(2 pieces galvanized steel w/ spongy resin center for soundproofing)

**SELECTED EXAMPLES OF CURRENT UNITED STATES LAW
CONTAINING A WAIVER OF DOMESTIC PREFERENCE
RELATING TO THE ACQUISITION OF STEEL**

Surface Transportation Assistance Act of 1982 (P.L. 97-424) - Section 165 (a) of the Act provides that “the Secretary of Transportation shall not obligate any funds authorized to be appropriated by this Act . . . unless steel, cement, and manufactured products used in such products are produced in the United States.” Subsection (b) of Section 165 provides that “[T]he provisions of subsection (a) of this section shall not apply where the Secretary finds . . . (2) that such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;” [Emphasis added].

Department of Defense Appropriations Act for Fiscal Year 1996 (P.L. 104-61)

- Section 8022 of the Act provides that “[N]one of the funds in this Act may be available for the purchase by the Department of Defense (and its departments and agencies) of welded shipboard anchor and mooring chain 4 inches in diameter and under unless the anchor and mooring chain are manufactured in the United States from components which are substantially manufactured in the United States . . . *Provided further*, That when adequate domestic supplies are not available to meet the Department of Defense requirements on a timely basis, the Secretary of the service responsible for the procurement may waive this restriction on a case-by-case basis.....” [Emphasis added].
- Section 8047 of the Act provides that “[N]one of the funds appropriated or made available in this Act shall be used to procure carbon, alloy or armor steel plate for use in any Government-owned facility or property under the control of the Department of Defense which were not melted and rolled in the United States or Canada: *Provided*, That these procurement restrictions shall apply to any and all Federal Supply Class 9515, American Society of Testing and Materials (ASTM) or American Iron and Steel Institute (AISI) specifications of carbon, alloy or armor steel plate: *Provided further*, That the Secretary of the military department responsible for the procurement may waive this restriction on a case-by-case basis by certifying . . . that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis . . .” [Emphasis added].
- Section 8099 of the Act provides that “[N]one of the funds appropriated by this Act may be used for the procurement of ball and roller bearings other than those produced by a domestic source and of domestic origin: *Provided*, That the Secretary of the military department responsible for such procurement may waive this restriction on a case-by-case basis by certifying in writing . . . that adequate domestic supplies are not available to meet Department of Defense requirements on a timely basis . . .” [Emphasis added].

PUBLIC LAW 101-221 [H.R. 3275]; December 12, 1989

STEEL TRADE LIBERALIZATION PROGRAM
IMPLEMENTATION ACT

at 103 STAT 1886

*As Act to implement the steel trade liberalization program.**Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*

SECTION 1. SHORT TITLE.

This Act may be cited as the "Steel Trade Liberalization Program Implementation Act".

SEC. 1. ENFORCEMENT AUTHORITY.

19 USC 2252
note

(b) SHORT SUPPLY SITUATIONS.—Section 805(b) of the Steel Import Stabilization Act is amended to read as follows:

"(b)(1) If—

"(A) a bilateral arrangement includes a provision relating to short supply situations; and

"(B) the Secretary of Commerce (hereinafter in this subsection referred to as the 'Secretary') determines, in accordance with this subsection, that a short supply situation exists in the United States with respect to a steel product that is subject to a quantitative limitation under such arrangement;

the Secretary shall authorize the importation of additional quantities of that product without regard to any aggregate quantitative import limitation in effect under such arrangement.

"(2) In determining under this subsection whether a short supply situation exists in the United States with respect to a steel product,

the Secretary shall take into account all relevant factors, including—

"(A) (to the extent information is available) the recent levels of capacity utilization for domestic facilities producing the product;

"(B) the quantity of the steel product requested in a short supply petition and the ability of domestic producers to supply the product in such quantity;

"(C) the willingness of a domestic producer to supply the steel product at a price which is not an aberration from prevailing domestic market prices;

"(D) reasonable specifications requested by the purchaser or any end user; and

"(E) delivery times to the purchaser and any end user of the steel product.

"(3)(A) A petition requesting a determination under this subsection may be filed with the Secretary. The petition must be in such form and contain such relevant information as the Secretary requires.

Federal
Register
publication

"(B) If the Secretary considers that a petition filed under subparagraph (A) is adequate, the Secretary shall promptly cause to be published in the Federal Register a notice that a determination under this subsection with respect to the steel product concerned is under consideration.

"(C) The Secretary shall provide opportunity for comment by interested persons regarding the issues raised in a petition.

"(D)(i) The petitioner shall certify that the factual information contained in the petition and any additional submission is accurate and complete to the best of the petitioner's knowledge.

(ii) An interested person shall certify that the factual information submitted by that person to the Secretary is accurate and complete to the best of the person's knowledge.

"(4)(A) If an adequate petition is filed under paragraph (3)(A), the Secretary shall determine, not later than the day specified in subparagraph (B)—

(i) whether a short supply situation exists in the United States with respect to the steel product; and

(ii) if the determination under clause (i) is affirmative, the quantity of the steel product that the Secretary will authorize for importation.

"(B) The Secretary must make a determination with respect to a petition not later than—

(i) the 15th day after the day on which the petition is filed if—

(i) the raw steel making capacity utilization in the United States equals or exceeds 90 percent;

(ii) the importation of additional quantities of the steel product was authorized by the Secretary during each of the 2 immediately preceding years; or

(iii) the Secretary finds, on the basis of available information (and whether or not in the context of a determination under this subsection), that the steel product is not produced in the United States; or

(ii) the 30th day after the day on which the petition was filed if neither subclause (i), (ii), or (iii) of clause (i) applies.

"(C) In making a determination with respect to which subparagraph (B) applies, the Secretary shall apply a rebuttable presumption that the short supply situation alleged in the petition exists.

"(D) The Secretary shall cause to be published in the Federal Register notice of each determination made under this subsection setting forth the reasons for the determination.

Federal
Register
publication

(5) If under this subsection the Secretary authorizes the importation of a specified quantity of a steel product, the Secretary shall notify a representative of the appropriate foreign government and issue to the petitioner the necessary documentation to permit the importation of that quantity.

(6) The Secretary shall prescribe regulations to carry out this subsection. The interim text of such regulations shall be issued on or before the 30th day after the date of the enactment of the Steel Trade Liberalization Program Implementation Act. The regulations shall provide for transparency and fairness in the process of making short supply determinations, and shall be consistent with the President's announcement on July 25, 1985, establishing the steel trade liberalization program.

Regulations

(c) CONFORMING AMENDMENTS.—Section 805 is further amended—

(1) by amending subsection (c) by striking out "may provide" and inserting "in consultation with the Secretary of Commerce, shall provide"; and

(2) by striking out "President's Steel Policy," in subsection (d)(3) and inserting "steel trade liberalization program".

Chairman CRANE. Thank you, Mr. Hickey.
Mr. Morton.

**STATEMENT OF JAMES C. MORTON, VICE PRESIDENT,
GOVERNMENT RELATIONS, MICHELIN NORTH AMERICA,
GREENVILLE, SOUTH CAROLINA**

Mr. MORTON. Thank you for this opportunity to appear before you today. I am Jim Morton, vice president, Government Relations of Michelin North America.

I am testifying here today in support of the Temporary Duty Suspension bill. This bill would enhance the competitiveness of U.S. companies that rely on imported components. It would not, in any way, undermine the effectiveness of U.S. trade law. With me today is Michelin's trade counsel, Louis Lebowitz.

Michelin is one of the largest tire manufacturers in the United States with tire manufacturing plants in South Carolina, North Carolina, Alabama, Indiana, and Oklahoma. We make tires of all descriptions from passenger car tires to airplane tires. We employ approximately 16,000 workers in our U.S. plants.

Michelin has experienced firsthand the need for a temporary duty suspension provision in the trade laws. Two years ago our competitive position was very narrowly undermined by exposure to antidumping duties for steel wire rod that we could not get from domestic sources. While, fortunately, the antidumping investigation on steel wire rod was eventually terminated, our involvement in that case made it very clear that U.S. domestic manufacturers can be needlessly harmed by broad antidumping cases that cover merchandise not available domestically.

The case also made clear to us there were really no effective mechanisms under current law to address such circumstances.

One of the chief components in our tires is steel to make tire cord. We purchase steel in wire rod form and draw the rod into wire for weaving tire cord. Our costs and competitive position depend on our being able to utilize wire rod effectively and efficiently.

A critical element in our use of wire rod is to ensure it does not break during the process of making wire and tire cord. At the time of the investigation, we had worked for more than 20 years to develop domestic suppliers for the particular wire rod we needed, but were unsuccessful. Therefore, we were left with no option but to import rod that met our specifications.

If antidumping duties had been imposed on our imports, our operation would have been placed in a very difficult situation. As we could not obtain the wire rod we needed from domestic sources, we would have had to import wire rod that was subject to antidumping duties, which would have increased our costs and made us uncompetitive with other U.S. manufacturers of tires because our largest competitor had negotiated an exclusion from the petition for the wire rod it needed, while the wire rod Michelin needed was not excluded.

A temporary duty suspension provision would give us a chance in a future trade case to approach the Commerce Department for a temporary exclusion of our product from duties, so long as we could show the products we need are unavailable domestically.

The trade laws do not now provide for temporary suspension of duties, meaning if a domestic producer ever intends to make a product, it would oppose a permanent exclusion.

Permanent exclusion of the wire rod we needed would not have been a viable option in our case because domestic producers have plans to attempt to manufacture this wire rod in the future and, in fact, have recently had success in doing so.

Permanent exclusion of a product from an order means petitioners will not be protected in the future from unfair trade with respect to that product, even if they start to manufacture it.

By contrast, temporary relief would encourage the domestic industry to develop new products because the domestic industry will receive the protections of the antidumping countervailing duty order once it begins to manufacture the particular product. Furthermore, downstream customers will remain in the United States, so that, when the U.S. industry begins to manufacture the needed input product, the industry will have a U.S. customer base.

Temporary suspension, thus, benefits both the domestic producers and the U.S. industrial users. We think that H.R. 2822 is a modest, but effective provision. The Temporary Duty Suspension bill simply provides temporary relief to downstream U.S. users when an upstream producer cannot supply the needed merchandise.

H.R. 2822 is an important priority for us. We are counting on the Subcommittee's report.

Thank you very much.

[The prepared statement follows:]

STATEMENT OF JAMES C. MORTON
VICE PRESIDENT, GOVERNMENT RELATIONS
MICHELIN NORTH AMERICA
ON H.R. 2822
PRESENTED TO THE SUBCOMMITTEE ON TRADE OF THE WAYS AND
MEANS COMMITTEE
April 23, 1996

Thank you for this opportunity to appear before you today. I am Jim Morton, Vice President, Government Relations, of Michelin North America. I am testifying here today in support of the temporary duty suspension bill (HR 2822). This bill would enhance the competitiveness of U.S. companies that rely on imported components. It would not, in anyway, undermine the effectiveness of U.S. trade laws.

Michelin is one of the largest tire manufacturers in the United States, with tire manufacturing plants in South Carolina, Alabama, Indiana, and Oklahoma. We make tires of all descriptions, from passenger car tires to airplane tires. We employ approximately 16,000 workers in our U.S. plants.

Michelin has experienced, first-hand, the need for a temporary duty suspension provision in the trade laws. Two years ago, our competitive position was very nearly undermined by exposure to antidumping duties for steel wire rod that we could not get from domestic producers. While, fortunately, the antidumping investigation on steel wire rod was eventually terminated, our involvement in that case made it clear to us that U.S. domestic manufacturers can be needlessly harmed by broad antidumping cases that cover merchandise not available domestically. The case also made clear to us that there were really no effective mechanisms under current law to address such circumstances.

One of the chief components in our tires is steel to make tire cord. We purchase steel in wire rod form, and draw the rod into wire for weaving tire cord. Our costs and competitive position depend on our being able to utilize wire rod effectively and efficiently. A critical element in our use of wire rod is to ensure that it does not break during the process of making wire and tire cord. At the time of the investigation, we had worked for more than twenty years to develop a domestic supplier for the particular wire rod we needed, but were unsuccessful. Therefore, we were left with no option but to import rod that met our specifications.

If antidumping duties had been imposed on our imports, our operation would have been placed in a very difficult situation. If we could not obtain the wire rod we needed from domestic sources, we would have had to import wire rod that was subject to antidumping duties, which would have increased our costs and made us uncompetitive vis-à-vis foreign tire producers. Nor would we have been able to compete with other U.S. manufacturers of tires because our largest competitor negotiated an exclusion from the petition for the wire rod it needed, while the wire rod Michelin needed was not excluded.

A temporary duty suspension provision would give us a chance in a future trade case to approach the Commerce Department for a temporary exclusion of our product from duties, so long as we could show that the products we need are unavailable domestically. The trade laws do not now provide for *temporary*

suspension of duties, meaning that if a domestic producer *ever* intends to make a product, it would oppose a permanent exclusion.

Permanent exclusion of the wire rod we needed would not have been a viable option in our case because domestic producers had plans to manufacture this wire rod in the future (and, in fact, have recently had success in doing so). Permanent exclusion of a product from an order means that petitioners will not be protected in the future from unfair trade with respect to that product, even if they start to manufacture it. By contrast, temporary relief would encourage the domestic industry to develop new products, because the domestic industry will receive the protections of the antidumping/countervailing duty order once it begins to manufacture the particular product. Furthermore, downstream customers will remain in the U.S. so that when the U.S. industry begins to manufacture the needed input product, the industry will have a U.S. customer base. Temporary suspension thus benefits both the domestic producers and the U.S. industrial users.

We think that H.R. 2822 is a modest, but effective provision. All the temporary duty suspension bill does is to provide temporary relief to downstream U.S. users in situations where an antidumping or countervailing duty order provides no benefit to upstream producers because they cannot supply the needed merchandise.

H.R. 2822 is an important priority for us. We are counting on the Subcommittee's support.

Mr. HANCOCK [presiding]. Thank you, Mr. Morton.
Mr. Dorland.

STATEMENT OF KEN DORLAND, CONSULTANT, ON BEHALF OF ENRON CORP., HOUSTON, TEXAS; AND FORMER VICE PRESIDENT, MATERIALS MANAGEMENT, ENRON CORP.

Mr. DORLAND. Mr. Chairman and Members of the Subcommittee, thank you very much for this opportunity to speak to you on the subject of fair treatment for all U.S. industry segments through the administration of our country's antidumping and countervailing duty laws.

I am Ken Dorland, representing Enron Corp., as part of the energy industry group. I will abbreviate my remarks to save time for your questions, since my objective here is to help each of you reach an accurate understanding of our point of view in this very important matter.

First, we support the application of the AD and CVD laws in specific situations where U.S. industry is faced with unfair foreign competition and injury is shown. But we insist products not available from the domestic sources should not bear penalties. These unwanted penalties can easily be avoided by having the Commerce Department wave the effects on a temporary case-by-case basis. The process language included in the VRA extension rules that were passed a few years ago worked very well in these circumstances. We would recommend you review them again.

Let me give you an example from my experience in the gas pipeline industry. Ours is one of the safest segments of the national transportation system. To keep it that way, we must obtain the best available quality in materials that we use. In certain sensitive cases, we want pipe that is made from plate that is tested and inspected, that is absolutely free of any structural flaw. The process exists in several foreign plate mills that can ultrasonically inspect each piece of plate while it is being produced. No domestic manufacturer can do this today. Shouldn't I, as a purchaser, be able to get pipe made by a U.S. pipe mill, with U.S. employees, but using ultrasonically inspected imported plate, without paying some extra financial penalty?

Please keep in mind that, number one, this product is not available from any U.S. source, but is included within the broad definition of plate under the AD and CVD orders; number two, since no U.S. company makes this product, no one can be injured by its importation; number three, the penalties paid would be borne by consumers of natural gas, while no one would benefit from the levy; and, number four, the relief we seek should be timely, temporary, and granted on a case-by-case basis. Similar examples exist for drill pipe, alloy production tubing, and other products.

It is the position of the energy industry group that, when it is necessary for the government to protect U.S. industry from unfair competition, it is also necessary that the government have the flexibility and sensitivity to see that domestic competition is maintained and that downstream industry and consumers are not unduly injured in the process.

Just as an aside, let me suggest a parallel here. When we build a pipeline, we place a relief valve in that pipeline ever so often so

that if one of our major customers suddenly shuts off his gas, the resulting pressure spike doesn't cause a catastrophic failure somewhere else in the system.

Here, when we are seeking to build a level playingfield, we may be inadvertently building a dam, and a dam without a spillway is extremely dangerous to everyone who lives downstream.

Thank you very much. I will answer any questions you may have.

[The prepared statement follows:]

TESTIMONY OF KEN DORLAND ON BEHALF OF ENRON CORP.
ON H.R. 2822
SUBMITTED TO THE HOUSE SUBCOMMITTEE ON TRADE
HOUSE WAYS AND MEANS COMMITTEE

April 23, 1996

I am Ken Dorland, representing Enron Corp., here as part of the Energy Industry Group supporting H.R. 2822 in the effort to provide for fair treatment of all U.S. industry segments through the administration of our country's antidumping and countervailing duty laws. We fully support the application of these laws in specific situations where U.S. made products face unfair competition from foreign made goods that are "dumped" priced below production cost or subsidized and where injury is shown. We do insist, however, that when a product not available from U.S. sources is needed, the supply of that product should not be impeded or penalized economically through inclusion in a generally applied categorical definition. When duties are imposed without injury, many U.S. industry segments are harmed without any compensating benefit to any other industry segment. This is harmful to domestic competition as well as detrimental to U.S. competitiveness in world trade. The additional cost of duties paid must ultimately be absorbed by the consumer. This injury is manifested in unnecessarily higher prices of goods and services or more innocuously in projects not undertaken or wells not drilled, thus the U.S. economy loses.

For example, the interstate pipeline systems must be able to depend on a consistent reliable supply of large diameter high grade pipe in order to maintain and expand the availability of energy to American industry and consumers. The government should not countenance situations that would disrupt the supply of pipe, and ultimately energy delivery. During the next several years pipeline companies plan to make significant expansions and upgrades to the current pipeline systems, providing jobs for many Americans. Materials for these projects must be available when and where needed and at a cost that make these projects economically viable.

The gas pipeline industry is one of the safest segments of our nation's transportation system. To keep it that way we must be able to obtain the best available quality in the materials we use. Some of these quality breakthroughs occur first in other countries and may not be available for a time in the United States. For example, full body ultrasonic inspection of steel plate is not now available from domestic mills but can be supplied routinely from some foreign sources (and at higher prices I might add). Why should the purchaser of this higher grade material be penalized with even higher import duties?

Domestic production of large diameter pipe is concentrated in only four manufacturers, two of which produce their own steel plate (the raw material for the production of pipe). The other two pipe producers must obtain plate from the two integrated producers or from foreign sources, a situation that puts the nonintegrated producers at a severe disadvantage when plate supplies are tight.

Moreover, some sizes and grades of plate are not produced in the United States and must be obtained abroad. When plate is covered generally by antidumping and countervailing duties orders, even supplies of specific kinds of plate not made in the U.S. are penalized by government unless relief can be provided in these special circumstances. This penalty is passed to consumers without benefit to any industry segment.

There are similar examples of potential shortages involving drill pipe and production tubing, as well as similar situations affecting other industry groups.

From the gas pipeline point of view, temporary duty suspension is a matter of timely supply rather than price. When a major pipeline expansion development is underway there is a relatively short time interval starting from the point that design criteria make possible the actual specification of the pipe (size and weight), and the quantity required, to the actual date this material is needed at the place of construction. This interval is effectively shortened further by the need for obtaining regulatory approvals before committing funds for the project. Thus the period between regulatory approval and start of construction is at best only a few months long. Hence it is economically imperative that the pipe purchases be divided among as many producers as necessary to manufacture the full quantity of pipe in time for the start of construction. There have been several times in recent years when combined project requirements have exceeded domestic capacity.

As indicated earlier, there are some specific material requirements that are not available at all from U.S. sources, yet they are covered by a generally defined antidumping order. These special materials often command higher prices than even the closest domestic offering. Without the kind of temporary, limited relief we are seeking we must pay even higher duties on this material while protecting no one from any conceivable injury.

It is the position of the Energy Industry Group that when it is necessary for the government to protect U.S. industry from unfair foreign competition, it is also necessary that the government have the flexibility and sensitivity to see that domestic competition is maintained and that downstream industries and consumers are not unduly injured by the process.

THE ENERGY INDUSTRY GROUP

American Gas Association

Amoco Corporation

Coastal Corp.

Columbia Gas Association Inc.

El Paso Natural Gas Company

Enron Corp.

Exxon Corp.

International Association of Drilling
Contractors

Interstate Natural Gas Association of
America

Koch Industries, Inc.

MidCon Corp.

Mobil

Natural Gas Supply Association

NorAm Gas Transmission Company

PanEnergy Corporation

Sonat Inc.

Texaco

The Williams Companies

Mr. HOUGHTON [presiding]. Thank you, Mr. Dorland.
Mr. Tasker.

STATEMENT OF JOSEPH TASKER, JR., VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL, FEDERAL GOVERNMENT AFFAIRS, COMPAQ COMPUTER CORP., HOUSTON, TEXAS

Mr. TASKER. Thank you, Mr. Chairman. It is a pleasure to appear on behalf of Compaq Computer Corp. to tell you about our experiences with antidumping cases involving products that are not made in the United States. We appreciate the opportunity to appear today.

Compaq is the world's largest supplier of personal computers offering desktop and portable computers, as well as powerful servers to a wide range of customers. We have manufacturing facilities in Erskine, Scotland, and China, but our corporate headquarters and our main manufacturing facility is in Houston, Texas, where we have more than 10,000 people involved in the manufacturing, design, and sales and marketing of computers.

As a leader in the market, we have had some early experience with notebook computers, the kind we are now all familiar with, but have only recently come into the market.

In the late eighties and early nineties, flat panel displays, in most cases, the so-called liquid crystal display or LCD, was becoming available for use, and they were not made in the United States, but that did not stop an antidumping case from being filed alleging that all flat panel display imports from Japan were being dumped causing injury to a small group of United States companies involved in the development of flat panel display technologies.

None of these companies made LCDs working in other technologies. There was one company that made a few LCDs of a special kind, known as an active matrix LCD, but they made them on a customized basis for military applications at extremely high cost per display, and they made about 12 of them per year, which is not as many as we need in a day.

Compaq, along with Apple and IBM, participated, as best we could, in the Commerce Department's antidumping investigation and, although we strenuously argued that active matrix LCDs were not available in the United States, we nevertheless saw the imposition of 63 percent antidumping duties at the end of the day.

At this time, which was in September of around 1991, we were in the process of introducing our first active matrix LCD computer. We moved our operations from Houston to build those computers, took them outside of the United States, and built that computer in Scotland, much against our business plans and better judgment. Why did we move? Because 63 percent antidumping duties were prohibitive. They added over \$1,000 to the cost of building the computer in the United States. We had Japanese competitors who were building similar computers in Japan or other countries. They could import the computers without cost and that would put us at a tremendous cost disadvantage if we tried to build them in the United States. It was impossible.

Why else did we move? Because there were no active matrix LCDs made in the United States. Even though antidumping was imposed, that didn't mean there was commercial production. And

if there had been \$500 million lying around to build an active matrix LCD plant, that is what it would have taken to get the United States up into commercial production over the course of 1 to 1½ years, we would have had no supply.

The duties remained in place, and we remained in Scotland, although we are, today, back able to make our computers in the United States. What happened? Is this a situation in which the Commerce Department's authority has shown itself to be adequate to solve a problem? I don't think so.

What happened was the one company making LCDs had a change of management, figured out that it was not a good idea to send their customer base offshore, asked to have the petition withdrawn and, after a couple of years at the Commerce Department, it was.

We are now working with that company and others in the United States to build active matrix LCD manufacturing capacity, but, to date, there still isn't any. We are strong supporters of the Chairman's bill to provide for temporary duty suspension because we think the current authority of the Commerce Department is lacking, current procedures are not adequate.

In closing, Mr. Chairman, I would only like to add that we believe this is not an unusual or strange provision, H.R. 2822. It is consistent with sound administration of the antidumping law from the perspective of American interests, and it, also, is modeled on the antidumping laws of other countries, including especially the European community, which is not known for its lax enforcement of antidumping procedures. If they can do it, which they have, without feeling they are interfering with the strong antidumping law, we should be able to do it as well.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement follows:]

**STATEMENT OF JOSEPH TASKER, JR.
VICE PRESIDENT AND ASSISTANT GENERAL COUNSEL
FEDERAL GOVERNMENT AFFAIRS
COMPAQ COMPUTER CORP., HOUSTON, TX**

Mr. Chairman, I am Joe Tasker, Vice President of Compaq Computer Corporation for Federal Government Affairs, and I very much appreciate the opportunity to appear before your subcommittee today, on behalf of Compaq, to discuss the Commerce Department's proposed regulations implementing the antidumping and countervailing duty provisions of the Uruguay Round Agreements Act, and how those proposed regulations relate to problems that many United States manufacturers, including Compaq, have had with obtaining products that are subject to U.S. antidumping orders but are not available in the United States. To summarize:

- The Department's regulations recognize that industrial users have a valuable perspective to add to antidumping proceedings and, in that, they represent a step in the right direction. But it is a small step, and not nearly enough.
- The Department's claim that current law and procedure are sufficient to deal with product availability questions is simply wrong. I know. Compaq and the rest of the American computer industry has been through this problem in a real case, and we have experience with the inability of current law to address the problem adequately.
- Our experience leads Compaq to join with other United States manufacturing industries as strong proponents of HR 2822, Mr. Chairman, which offers the prospect of providing real relief to American industry inadvertently injured by the antidumping duty procedure.

Compaq is the world's largest supplier of personal computers, offering desktop and portable PC's as well as powerful servers that provide midrange computer functionality for applications throughout the business, government, industrial or educational enterprise. We sell and support our products in more than 100 countries, and are recognized as one of the 20 largest US exporters of any product. Annual sales in 1995 amounted to \$14.8 billion, making Compaq the 5th largest computer company in the world. We manufacture products in Erskine, Scotland; Singapore, Brazil, China, and at Compaq's Corporate Headquarters in Houston, Texas, where we employ more than 10,000 people in product design, manufacturing, sales and marketing.

As a leader in the market, we have long been involved in the design and manufacturing of laptop and notebook portable computers. In the late 1980's and early 1990's flat panel displays, in most cases so-called "liquid crystal displays" or LCD's, were becoming available for use in computers making possible the common modern "clamshell" computer design with which we are now all fairly familiar. LCD's were not made in the United States, but that did not stop an antidumping case from being filed alleging that all flat panel display imports from Japan were being dumped, causing injury to a group of small US companies involved in the development of flat panel display technologies. None of these companies made LCD's, working primarily on alternative technologies such as electroluminescent or gas plasma displays. One company made a few LCD's of a special kind, known as "active matrix LCD", on a customized basis for military applications at an extremely high cost per display, but this firm lacked the capability of making any displays on the basis of mass production methods.

Compaq, along with Apple and IBM, participated as best we could in the antidumping investigation. We appeared as "importers", since that was the only way we could claim standing to participate at that time, and argued strenuously that Active Matrix LCD's were not available in the United States on a commercial basis and that there was no injury caused by commercial imports of Japanese

products. Our efforts were ultimately to no avail: antidumping duties of 63% were imposed on imports of Active Matrix LCD's from Japan.

At this time, September of 1990, we were in the process of just introducing our first computer with an Active Matrix LCD (AMLCD) screen. As a result of the imposition of these duties, we had no choice but to move production of this computer from Houston to our facility in Erskine, Scotland, at a substantial cost of materials and Houston manufacturing jobs. Scotland produced this computer for the worldwide market, including the United States.

Why did we move? For one thing, the 63% duty on the AMLCD ruled out importing them into the United States. At the time, each AMLCD cost us more than \$ 1,000, so the duty added over \$600 to the manufacturing cost of a \$3,000 computer. This was an intolerable cost burden we could not bear. This is especially so in the highly competitive computer industry. We have many Japanese and other global competitors who remained free to build computers with AMLCD's outside the US, where the antidumping duties on screens did not apply, and import the finished computers. We had to do no less to remain cost competitive in the US market.

For another thing, we simply could not obtain any AMLCD's in the United States. Antidumping duties may have been imposed on imports, but there was no commercial production in the U.S. Even if we had had \$ 500 million to spend on developing a commercial AMLCD production facility -- this was the amount that reliable testimony at the ITC estimated would be required -- it would have taken as much as a year to get such a facility operational. And it was not at all clear that the US company building customized AMLCD's had the process technological know-how to build a successful factory. It was just impossible.

Still the duties remained in place, and we remained producing AMLCD computers offshore, as a competitive necessity.

Today, there are no more duties on AMLCD screens and we are once again able to produce computers with such screens in Houston. What happened? Was this an example of the way that current Commerce Department procedures are adequate to meet the needs of US industry when product covered by an antidumping order is unavailable?

In a word, no.

What happened was this: the one US company making customized AMLCD's had a change of ownership. The new owners, a larger firm attracted by the technology and the market opportunities, found that the antidumping duties had driven their customer base out of the country. When production leaves the United States as a result of one of these problems, R&D and other ancillary functions may not be far behind, and this concerned the new owners. They petitioned the Commerce Department to withdraw the petition as to AMLCD's.

We joined in that petition. After a rather lengthy proceeding during which Commerce made sure there were no other companies who might complain about the AMLCD petition being withdrawn, Commerce finally acted, almost 3 years after the original case was filed.

Today, the company that asked to have the petition withdrawn is working hard on the continuing development of AMLCD's in the United States and Compaq, along with other companies, is lending technical and related support. Full scale commercial production levels have not yet been achieved. But it was the foresight of new management, which had to overcome the provisions of current law with a forceful claim to withdraw the petition three years after the fact, which led to this good result.

Let me briefly fit this story into today's discussion of draft Commerce Department regulations and the proposed Temporary Duty Suspension Act.

The draft regulations, at section 351.312, provide consumer organizations and industrial users the opportunity to submit information and argument on "matters relevant to a particular Commerce Department determination." But the draft also narrowly circumscribes the "relevant matters" and emphasizes that users are not "parties to the investigation" with full access to business proprietary information through responsible outside counsel.

This is a step in the right direction. It would have been better if Compaq in the 1990 flat panel case could have been recognized as an industrial user of LCD's in the proceeding, rather than as an "importer." There is an undeniable prejudice against importers in the law, no matter how hard everyone has tried over the years to eliminate it, and it would be helpful for domestic interests like Compaq to be recognized as such.

But this is a pretty small step, since industrial users are limited in the issues they can pursue and are not able to access confidential information even through their responsible outside counsel. Industrial users should have the right to participate fully in the investigation if they so choose, since as the Department points out they may have valuable information to convey. And it is frankly insulting to say that a foreign company through its outside counsel can have access to confidential information collected in the investigation, while a United States firm cast as an industrial user (rather than as an "importer"), may not.

Beyond this, the Department's draft regulations note in the preamble (61 F.R. at 7323) that

Some commentators have expressed the view that industrial users of products under antidumping or countervailing duty orders should have an opportunity to demonstrate that certain products are not available domestically, that continued inclusion of such products within an order does not serve the purpose of the law, and that, if the petitioners fail to show that the material is available domestically the order should be narrowed with respect to those certain products.

The Department then states in no uncertain terms that

We are not proposing changes to the rules in this area because the existing practices have been adequate to address valid concerns.

Mr. Chairman, I am here today to emphasize that, having gone through the "existing practices", they are not in any way "adequate."

I think that one of the concerns the Department has, and it is legitimate, is that the current procedures for excluding products from the scope of antidumping or countervailing duty investigations and orders create permanent rather than temporary solutions. What if there is no production today, but there might be at some future time? Better be cautious and leave the product in the order. Future production might arise, and should be protected from injury by dumping.

That is why, Mr. Chairman, that current procedures are not adequate, and why there is such a need for enactment of your bill, HR 2822. It creates in the Department some new authority but gives ample discretion to review all the issues and reach reasoned decisions that try to balance all the legitimate American interests. The temporary nature of the duty suspension provided by the bill means that changes can be made later, if appropriate, and without a long delay. But by the same token, duties can be suspended, more readily than today and without the long delays of changed circumstances proceedings. Indeed, information I have seen indicates that the only "changed circumstance" that has

mattered to date is a change of mind by the petitioners, as happened in our case. There ought to be a more objective standard.

Compaq commends you for introducing HR 2822, Mr. Chairman. I would note that it is not a novel or a dangerous concept, nor does it in any way signal a weakening of the antidumping law. Canada has a provision -- not exactly like this, but similar in principle -- for sorting out the different domestic interests after antidumping or countervailing duties are imposed. The Canadian version of the ITC holds a hearing -- which only Canadian interests can participate in -- which can lead to exempting some imports from duties in appropriate cases when such products are unavailable in Canada. And, as others have mentioned, the European Union has introduced a temporary duty suspension provision as part of its new antidumping regulation implementing the Uruguay Round. This is the European provision on which H.R. 2822 is modeled.

That makes the European experience especially interesting. In response to those who say that a temporary duty suspension provision would overwhelm the Commerce Department with requests, I would note that the European Commission has acted on only one case in the year that the provision has been in effect, and it does not seem overwhelmed by requests. To those who say that such a provision indicates a weakening of the antidumping law, I would challenge them to say that the antidumping law of the European Union -- long known as a strong and powerful weapon of domestic industries, just as it is in the US -- has in any way been diminished. It has not been; nor would the US law be impaired.

All we are talking about is a better way to deal with competing, legitimate domestic interests of United States industry, all of whom are involved in American manufacturing, all of whom support a strong, carefully targeted antidumping and countervailing duty law, and all of whom want to contribute to the economic growth and prosperity of the United States.

Thank you again for the opportunity to present these comments, Mr. Chairman. I will be happy to answer any questions from the Subcommittee.

Chairman CRANE. Thank you, Mr. Tasker.
Mr. Black.

STATEMENT OF EDWARD J. BLACK, CHAIRMAN, PRO TRADE GROUP, INC., WASHINGTON, DC; AND PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION; ACCOMPANIED BY BRUCE AITKEN, AITKEN, IRVIN, LEWIN, BERLIN, VROOMAN & COHN, LLP; AND PETER SUCHMAN, PARTNER, POWELL, GOLDSTEIN, FRAZER & MURPHY, WASHINGTON, DC

Mr. BLACK. Mr. Chairman and Members of the Subcommittee, thanks for the opportunity to appear before you today to discuss these issues, both with regard to the antidumping regulations and with regard to H.R. 2822, the Temporary Duty Suspension Act.

I am accompanied today by our counsel, Bruce Aitken of the firm of Aitken, Irvin, Lewin, Berlin, Vrooman, & Cohn, LLP; and Peter Suchman of Powell, Goldstein, Frazer & Murphy.

CCIA, its member companies, and members of the Pro Trade Group, and an increasing number of highly competitive companies, understand that their ability to compete globally is essential to their survival. At the national level, there is little debate that exports are a growing and vital sector of our economy. The administration of the antidumping laws, both here and abroad, can affect the competitiveness of U.S. firms. Accordingly, we suggest that the Subcommittee, the Congress, the U.S. Department of Commerce, and the U.S. International Trade Commission need to take into account the ways in which antidumping laws impact on U.S. exports as well as imports.

We, generally, support the department's approach in the development of new regulations with, however, certain qualifications, which have been laid out in detail in the statement submitted for the record.

We, also, strongly support the Chairman's bill, H.R. 2822, Temporary Duty Suspension legislation. Even as the world economy has become more integrated in many ways, the number of countries with antidumping laws has jumped from only 10 in 1980 to over 40 today. This proliferation of antidumping laws can act as a disincentive to U.S. exporters from participating in markets, especially when those procedures are arbitrary and biased.

The determination as to whether dumping has occurred requires complex and extremely fact-intensive analysis. Furthermore, normal commercial practices may, under certain circumstances, be considered to constitute dumping and, thus, be deemed unfair under the antidumping laws of various countries, including the United States. Thus, businessmen may inadvertently find themselves liable for dumping duties merely because some individual sales in the export market are below the average prices charged at home or because, at the bottom of the business cycle, goods are sold below the fully allocated cost of production, although above the variable costs.

In addition, the ways costs and adjustments to price may be calculated by the Department and foreign agencies administering similar laws can be far removed from the way businesses keep their accounts for normal business purposes. Further, it should be

recognized that a foreign exporter to the U.S. market may have a greater incentive to respond to U.S. antidumping or countervailing duty investigations than U.S. exporters facing foreign antidumping cases because the market in that country may be too small to justify the time and expense of responding.

We believe that, quite literally, the world is watching what U.S. authorities do in implementing these aspects of the GATT accords. To the extent the Department develops regulations which reopen old debates or distort the intent of the agreement, it is reasonable to expect our trading partners to do the same. We strongly oppose any regulatory proposals which create this risk and call on the Department to strictly construe the intent of the agreement in attempting to develop regulations pursuant to U.S. implementing legislation.

There is insufficient time here to discuss the technical aspects of these regulations, although we would be happy to attempt to respond to questions. One key element of concern to mention, however, is a desire for fair comparisons. It is self-evident that, unless the Department is guided above all by the objective of making fair apples-to-apples comparisons, the legitimacy of U.S. procedures will be subject to questions and, indeed, to challenge in the U.S. courts and the WTO. Too often, in the past, the Department's comparisons have raised questions of fundamental fairness. We, therefore, strongly believe this requirement for a fair comparison should be carried forward into the regulations, it should be clearly stated therein that this principle will be applied in deciding which prices to compare, which adjustments to make to those prices, how those adjustments should be calculated, and in all other aspects of ascertaining whether dumping margins exist.

As indicated, PTG, the Pro Trade Group, strongly supports H.R. 2822, the Chairman's bill, which, under conditions of short supply, would permit the Department to temporarily suspend the antidumping and countervailing duties. We do not believe this legislation would interfere with the effectiveness of U.S. trade laws. Rather, we feel it would enhance U.S. competitiveness.

We believe that availability of supply is a legitimate concern of U.S. producers. Temporary duty suspension preserves the customer base, while there is no U.S. production available and reinstates relief when the domestic industry makes supply available.

Thank you, Mr. Chairman.

[The prepared statement follows:]

**STATEMENT OF EDWARD J. BLACK, CHAIRMAN
PRO TRADE GROUP, INC., WASHINGTON, DC; AND PRESIDENT
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION
ACCOMPANIED BY BRUCE AITKEN, AITKEN, IRVIN, LEWIN,
BERLIN,, VROOMAN & COHN, LLP; AND
PETER SUCHMAN, PARTNER, POWELL, GOLDSTEIN, FRAZER & MURPHY
WASHINGTON, DC**

INTRODUCTION

We commend the Subcommittee for considering the efficiency and effectiveness of the U.S. Department Commerce (Department) antidumping investigation procedures, as well as possible changes to our antidumping and countervailing duty laws. Generally, we wish to offer our general support for the Department's approach to the development of new regulations, with certain qualifications. We intend to file detailed comments next month with the Department. We also wish to express our strong support for H.R. 2822, temporary duty suspension legislation and include here, as well, comments on U.S. International Trade Commission (Commission) procedures related to these investigations.

As to our views, generally we believe that the Committee should assure that in the development of implementing regulations, the administering agencies propose procedures which faithfully implement the Uruguay Round (UR) Agreement and resist efforts to transform these laws and procedures into punitive, trade restricting barriers. During the pendency of Congressional consideration of UR legislation, over 100 companies and trade associations signed a letter to Amb. Kantor which sets forth our goals and concerns regarding UR implementation. We have the same goals and concerns regarding the possible changes now being considered. A number of our concerns were reflected in comments, referenced specifically below, which we filed with the Department and Commission last year, and in our recent submission to the full Committee. As to USITC procedures, a number of our concerns were reflected in these submissions.

The PTG is a broad coalition of U.S. companies and organizations that represents U.S. exporters, importers and consumers, including manufacturing, agricultural, wholesaling, retailing, service and civic interests, which actively seek to develop competitive markets and promote trade. It was founded in 1986 and is committed to expanding, not restricting, trade and promoting policies which achieve that goal and resultant economic prosperity. We were actively involved in the development and passage of the Omnibus Trade and Competitiveness Act of 1988 and played an equally active role in the consideration and enactment of UR implementing legislation. We are committed to helping develop and implement constructive, trade expanding policies, laws and regulations. The positions of the PTG represent a consensus view although PTG participants may have varying views on particular issues.

AMENDMENTS TO DEPARTMENT PROCEDURES

In implementing changes to antidumping investigation procedures, we believe that both the Department and the Commission should recognize the implications for U.S. exporters. In short, we suggest that the Subcommittee, the Department and the Commission take into account the impact of U.S. laws, regulations and practices on U.S. exports as well as U.S. imports.

The world economy has become more integrated. Among the competitive challenges facing U.S. industry, and industrial consumers, are not only the possible harm caused by unfairly traded imports into the United States, but also the fact that U.S. exports increasingly are accused of unfair trade practices overseas. As one PTG participant noted in a submission to the Department last year, the number of countries with antidumping laws has jumped from only 10 in 1980 to over 40 today. As it noted in its submission, this proliferation of antidumping laws, and of antidumping investigations, in our export markets, can act as a disincentive to U.S. exporters from participating in that market, especially when those procedures are arbitrary and biased so as to favor the "domestic" petitioner, irrespective of the country in which the investigation is taking place.

The determination as to whether dumping has occurred requires complex and extremely fact-intensive analysis. Furthermore, normal commercial practices may, under certain circumstances, be considered to constitute "dumping" and thus be deemed "unfair" under the antidumping laws of various countries, including the United States. Thus, businessmen may inadvertently find themselves liable for dumping duties merely because some individual sales in the export market are below the average prices charged at home, or because at the bottom of the

business cycle goods are sold below the fully allocated costs of production -- although above variable cost. In addition, the ways that costs and adjustments to price may be calculated by the Department (and foreign agencies administering these laws) can be far removed from the way businesses keep their accounts for normal business purposes. Thus, while an automobile manufactured in Detroit and sold below its fully allocated cost in Miami, because of a factory rebate scheme, is deemed a boon to the customer, if that same automobile, with the same rebate, is sold in Germany, the product may be deemed to be sold at an "unfair" price.

Further, it should be recognized that a foreign exporter to the U.S. market may have a greater incentive to respond to U.S. antidumping or countervailing duty investigations than U.S. exporters facing foreign antidumping cases, because the market in that country is too small to justify the time and expense of responding. The submission referenced above, e.g., noted that such cases can "act as a virtual, instantaneous barrier to U.S. goods," and that they are a major concern to both big and small businesses, especially in low-margin, highly competitive trade.

We believe that, quite literally, the "world is watching" what U.S. authorities do in implementing these aspects of the UR. To the extent that the Department develops regulations which reopen old debates, or distort the intent of the Agreement, it is reasonable to expect our trading partners to do the same. We strongly oppose any regulatory proposals which create this risk and call on the Department to strictly construe the intent of the agreement in attempting to develop regulations pursuant to the U.S. implementing legislation. As will be evident in our forthcoming comments on the Department's proposed regulations, while we do not agree with all that the Department has proposed, we believe that the Department has attempted a fairly even-handed interpretation of the statute and the international obligations of the United States. Some improvements, however, need to be made.

Particular Issues of Concern

The Department's effort to develop implementing regulations related to changes in U.S. antidumping law is, obviously, an extraordinarily complex exercise. We make no effort here to comment on all the issues of concern to our members. However, we intend to address these issues more comprehensively in responding to the Department's notice of rulemaking. Even to adjudge which issues are more important than others is difficult, because individual participants' interests vary. Nonetheless, given the foregoing points, and the PTG's and, certainly, the high-tech industry's, overall commitment to expanding trade, we take particular note of certain issues. These are where proposals have been made which may work against our goals of more open markets and fairer trade as the criteria of overriding importance in developing implementing regulations. These include comments on the following topics:

- (a) making a fair comparison;
- (b) use of "facts available";
- (c) treatment of affiliated parties;
- (d) reimbursement of countervailing duties;
- (e) the "market-oriented industry" test, and
- (f) temporary duty suspension for short supply.

Making Fair Comparisons

The UR Antidumping Agreement, and our implementing legislation, explicitly provides that "a fair comparison must be made between the export price and the benchmark home market price" when the Department is making its calculations to determine whether dumping has occurred. Strangely, this overarching requirement of fairness is reflected nowhere in the draft regulations.

It is self-evident that, unless the Department is guided above-all by the objective of making a fair "apples to apples" comparison, the legitimacy of U.S. procedures will be subject to question, and indeed to challenge, in the U.S. courts and the WTO. Too often in the past, the Department's comparisons have raised questions of fundamental fairness. We therefore believe

strongly that this requirement for a fair comparison should be carried forward into the regulations, and that it should be clearly stated therein that this principle will be applied in deciding which prices to compare, which adjustments to make to those prices, how those adjustments should be calculated, and in all other aspects of ascertaining whether dumping margins exist.

Use of "Facts Available"

U.S. legislation, the "URAA", reflecting changes to the Antidumping Agreement, necessitates a departure from prior Department practice in wielding "best information available" (or BIA) as a proverbial club over the heads of parties who were unable to respond to the Department's voluminous requests for information. Perhaps no aspect of the Department's administration of the law has been so criticized by our trading partners as "BIA."

The Agreement contains an entire annex devoted to how and when facts available may be used. It requires that authorities accept information which may not be ideal in all respects, provided the party acted to the best of its ability. Furthermore, if findings are based on secondary sources, authorities are to "do so with special circumspection" and should, where practicable, verify the information from independent sources.

In other words, the Department is not supposed to arbitrarily reject respondents' submissions because they are not perfect and instead use self-serving data contained in the petition. In order to carry forward these requirements of procedural fairness, the regulations should clearly state that the Department will take into account all information submitted by respondents; that in determining whether respondent has acted to the best of its ability to supply requested data, that the Department will take into account whether such data is normally maintained in the ordinary course of business; that failure to produce data from "affiliated parties" over which respondents have no real leverage will not justify an adverse inference; and that, generally, the adverse application of "facts available" will be a measure of last resort and will take into account the magnitude of the deficiency and the likely effect on any margins.

Reimbursement of Countervailing Duties

The regulations provide for the deduction from U.S. price in the dumping margin calculation of countervailing duties reimbursed to the importer. There is no authority in the statute for this proposal which is based on a conceptual confusion of countervailing duties -- which are unrelated to export price -- and antidumping duties, which are. The Department's sole basis for this proposal is a statement in the Senate Finance Committee Report on our URAA. Since there is no support in the relevant international agreements, House Report, Statement of Administrative Action or in the U.S. law itself, and since this proposal marks a radical departure from past practice, we believe this issue should be reserved for consideration when this law is next before the full Congress.

Market-Oriented Industries

The proposed regulations codify many of the practices which have evolved within the Department for making antidumping calculations for products produced in non-market economy (NME) countries. We compliment the Department for this effort, especially given the growing importance of trade with countries NME's such as China, Russia and Ukraine.

We are disappointed, however, that the Department has failed to propose a realistic method for insuring fairness in cases involving economies in transition, where some industry sectors operate in a market environment. We believe that the Department should modify its current practice concerning Market Oriented Industries (MOIs) and NME's by promulgating regulations which provide encouragement for the evolutionary development of market economies.

Specifically, where with regard to the industry under investigation there is no government involvement in setting the prices or production quantities of the product, and where the industry

is characterized by private or collective ownership, a presumption should be created that a MOI exists, and that a normal dumping analysis (as opposed to a NME analysis) will be conducted. This presumption can be overcome by a demonstration that prices determined by central government authority are paid for inputs constituting a substantial proportion of value of the final product.

Affiliated Parties

There has been a clear evolution in the Department's practice concerning how related party transactions are treated in antidumping analyses. Increasingly, the Department has expanded the amount of information it seeks regarding sales to and purchases from such parties. Because of changes in the law and Agreement, the concept of "related" has now been expanded to "affiliated" -- no longer will the Department look only to ownership relationships. Now, apparently commercial relationships may also create special circumstances which will lead to the disregard of transaction prices.

Nothing has done more to increase the data demands, and consequently the burden, on respondents than this expansion of the related party -- now affiliated party -- exception. The Department needs to provide very clear guidance to the parties as to how it intends to implement these changes, and to put realistic limits on its interpretation of the law.

Specifically, the regulations should establish an objective, transparent arm's-length test for determining when a home market sale to an affiliated person will be disregarded in calculating normal value. Secondly, in calculating cost of production, the Department should allow use of transfer prices rather than costs from affiliated suppliers for all but major inputs and then require supplier costs only in exceptional circumstances and where the respondent can realistically obtain such information. Finally, and most importantly, the definition of affiliated persons and parties should give more meaningful guidance, especially with regard to what the Department believes constitutes "control." We suggest that the definition of control contained in Section 773 of the statute be repeated in the regulations, and that the regulations clearly state that normal commercial relationships, such as long-term requirement contracts, debt-financing consistent with commercial terms, and suppliers that have participated in "design-in" pre-production phase, do not constitute "control" or an affiliated party relationship.

Temporary Duty Suspension For Short Supply

Finally, we wholeheartedly endorse the views filed with the Department last year of another PTG participant, the American Association of Exporters and Importers (AAEI), regarding the need for temporary duty suspension authority for short supply situations in antidumping and countervailing investigations. While we prefer to obtain materials and components from domestic sources, sometimes we must import inputs because needed supplies cannot be sourced domestically. The imposition of antidumping and countervailing duties on imported inputs that are not available domestically places a substantial burden on industrial users, without providing any benefit to domestic companies. Failure to consider domestic availability in the administration of the AD/CVD laws undercuts the ability of U.S. producers to compete in the U.S. and in export markets.

In the context of the debate over the UR implementing legislation, the Department acknowledged that short supply considerations are relevant to the administration of the antidumping and countervailing duty statutes. The Department also took the position that it has the authority to address short supply considerations in the context of its current procedures. Despite this asserted authority, however, we are unaware of any instance in which the Department has, in fact, considered lack of domestic availability in an antidumping/countervailing duty proceeding to the point of suspending antidumping or countervailing duties in a case; nor has the Department temporarily revoked an order due to non-availability of a product until after Chairman Crane's legislation was introduced.

Our views regarding this legislation, which we support, are discussed below.

TEMPORARY DUTY SUSPENSION LEGISLATION

The PTG strongly supports H.R. 2822, a bill introduced by Chairman Crane which would permit the U.S. Department of Commerce, under conditions of short supply, to temporarily suspend antidumping and countervailing duties. This could occur with respect to specific products needed by American firms when these products are unavailable from U.S. producers. We do not believe that this legislation would interfere with the effectiveness of U.S. trade laws. Rather, we feel it would enhance U.S. competitiveness.

Generally, we believe that availability of supply is a legitimate concern of U.S. producers. If product is not available from domestic suppliers, simply paying extra duties on imported product may not be a viable commercial option. Further, H.R. 2822 encourages investment. Current law doesn't. If an antidumping or countervailing duty order is in place and the domestic industry does not supply the product, then clearly more encouragement is needed. Temporary duty suspension preserves the customer base while there is no U.S. production available and reinstates relief when the domestic industry makes supply available.

This issue is addressed in greater detail in that submissions filed last month with the Committee by the PTG's Fair Trade Forum and the Temporary Duty Suspension Group, both of which the PTG concurs in and aligns with.

AMENDMENTS TO USITC PROCEDURES

We note that the Subcommittee's hearing notice not only addressed specific proposed changes to the Department's procedures related to the administration of the antidumping laws, but of the also invited comments on related issues. Accordingly, we offer here two other possible reforms. The first two include: (a) changes to the Commission's composition and voting structure; and (b) possible application of the Government in Sunshine Act to certain Commission meetings. In addition, we also invite the Subcommittee's attention to certain reforms to the Commission procedures which we proposed in our 12/21/95 submission to the Commission.

Commission Composition and Voting Structure

As noted, we concur with, and incorporate by reference, the detailed comments on this subject filed with the Committee last month by the PTG's Fair Trade Forum. In essence, we believe that a legitimate goal of this Subcommittee is to seek ways to facilitate a more collaborative and deliberative process by the Commission in reaching injury determinations. We believe that this could, and would, be facilitated by several reforms, including:

- (a) provision for an odd, as opposed to even, number of commissioners; and
- (b) elimination of the current procedure wherein the USITC votes are deemed to constitute affirmative injury determinations.

Possible Application to the USITC of the Sunshine Act

Furthermore, we support the application of the Sunshine Act to meetings of USITC Commissioners for the purpose of discussing USITC determinations in antidumping and countervailing duty cases. As indicated, we concur with, and incorporate by reference here, the more detailed discussion of this issue in the comments filed last month with the Committee by the PTG and its Fair Trade Forum. Essentially, we believe that collective or collaborative Commission determinations would result in more fully reasoned decisions which better protect the public interest.

Possible Changes in USITC Regulations

In addition, as noted in our 12/21/95 submission to the Commission, we recommend a

number of other changes to Commission procedures. These include possible changes related to the following topics:

- (a) filing of petitions (service, content and completeness requirements);
- (b) determination of petitioner's standing;
- (c) procedural rights of consumers and industrial users;
- (d) disclosure of business proprietary information under APO;
- (e) producer questionnaires;
- (f) verifications;
- (g) use of "facts otherwise available";
- (h) possible investigative activity between preliminary and final determinations;
- (i) prehearing briefs;
- (j) institution of final investigations; and
- (k) final comment procedures.

These concerns relate to the Commission's ongoing effort to develop implementing regulations related to changes in U.S. antidumping and subsidy law. Obviously, this is a complex exercise. We believe that our trading partners are watching this exercise closely and urge the Subcommittee, in its oversight of these issues, to help ensure that both the Department and the Commission develop regulations that do not reopen old debates, or distort the intent of the UR Agreement.

This comment is designed to address a number of issues of special concern to the PTG and its participants. It is intended, in part, to serve as a supplement to our 4/3/96 submission to the Department and our 12/21/95 submission to the Commission on possible changes to their procedures. It also is designed to complement our 3/1/96 submission to the Ways & Means Committee and the simultaneous, technical comments of the Fair Trade Forum, a project and subdivision of the PTG, as well as those of the Temporary Duty Suspension Group, whose comments we endorse and incorporate by reference here. Through the PTG's Fair Trade Forum, we intend to file detailed technical comments with the Department on 5/15/96 in response to its current request for comments on revisions to its regulations. These will form the basis for a post-hearing submission we intend to file with the Subcommittee by its 5/7/96 deadline.

Respectfully submitted,

Edward J. Black

Edward J. Black

President, Computer & Communications
Industry Association
Chairman, Pro Trade Group

Chairman CRANE. Thank you, Mr. Black. I have a few questions I want to throw out to all of you. So anyone jump in with a response.

In your experience, how often has either the Commerce Department or the ITC excluded a product from the scope of an order based on the availability of that product from U.S. producers?

Mr. HICKEY. Well, Congressman, the Assistant Secretary this morning mentioned that they have just done two, and one of those, I think, she was referring—both of those were in the steel area—and one of them was a 14-month window and the other one, I think, was 8 months after the petitioners had petitioned that the products were not made in the United States.

So how does the system work when it takes you 14 months to get somebody to say, "Yeah, nobody here makes it"?

Chairman CRANE. Does anyone else want to comment?

Mr. SUCHMAN. Mr. Chairman, if I might, I think it is critical to have listened carefully to Assistant Secretary Esserman because she very carefully conditioned her response. There is no authority to do what the Department of Commerce does. What they do is they get the petitioners to go along in a process to exclude products under an authority which exists for revoking an order, and the only way it works is if the petitioners go along with it. That is not a short supply provision, and it is not an adequate way of dealing with the problems that these gentlemen have in conditions of short supply.

Mr. DORLAND. In the VRA expansion or reauthorization in 1989, we put in some short supply language that worked very well for 2½ years. It was used by my company on two occasions. It was direct. It was clear what was needed. I, personally, came to Washington and delivered the documents myself, started the 30-day clock running. It worked. We could run a project and have a reasonable feeling that we had low risk in proceeding.

With the present system, it is so uncertain I am not sure we would bother to try.

Mr. HICKEY. Mr. Chairman, one other point I would like to make is there are 300,000-plus metal users out there. We have very large companies represented. I represent a trade association. Most of the people who buy steel from us don't have the ability to have somebody hop on a plane and come to Washington and talk to somebody because they don't understand the process. And, if they have to go hire a trade lawyer, the reality is nothing will get done.

Chairman CRANE. Do any of you contemplate the short supply provision should include inquiry into price?

Mr. HICKEY. Congressman, have you looked at modeling them after the "Buy America" Program?

Mr. TASKER. Well, Mr. Chairman, the question of price is often thrown up as an argument by the opponents of the short supply provision who say that all we really want to do is buy dumped imports.

With a couple of exceptions, I would say that I think price is not the consideration. If you looked in our own case that we had a problem with, you could buy 12 displays a year from this company for \$50,000 apiece, and that was not an economically viable thing to do, and we needed more than 12 a day. So you can convolute

those facts into saying that what we wanted to do was buy cheap. I don't think that is at all appropriate because, if you bought the 12 at \$50,000, you still needed hundreds and hundreds more, and it wouldn't have done them any good to buy those 12 displays.

So price, I think, in our judgment, is really not the issue here, and we, with understanding some of those caveats to make sure we have the kind of flexibility I just described, I don't think we would object to having it made clear that what we are not talking about here, when we say availability, we are not talking about simply being able to buy it more cheaply offshore, when there is ample supply at a higher price in the United States.

Chairman CRANE. Does anyone else want to comment on that?

Mr. BLACK. Let me echo support for what Joe Tasker said, but let me put it in a slightly broader context as well. We are dealing with global industries and companies that need to compete around the world. The thing they need is predictability and reliability. We need to know what is going to be available. In many cases, we have imported products and components which take a great deal of special fitting into much larger products. To have supply cut off and all of a sudden find out it is unavailable can ruin a product line worldwide. So it is, clearly, as Joe said, that we are not talking about domestic price differential as the key. It is reliability, it is availability of product. It is being able to predict, as a businessman, where your product will go.

Mr. DORLAND. In the case of drill pipe, in the petroleum exploration business in drilling, it is not a matter of price so much as just absolute availability. There is only one manufacturer left in the United States, after quite a shock in the eighties, that still makes the complete piece of drill pipe with the end connections and all. They are offering a 6-month delivery right now. The drilling contractors are out there straightening out old, derelict, bent drill pipes to try to make do and aren't succeeding very well.

There are a few people out there that bought up all of the distress stocks back in 1985 and 1986, and they have got it back in the barn, and they are still out there plugging and saying, "See, I told you so." No one thought they were smart when they did that.

But it is having an effect. There are going to be drillers out there in our own country—I mean, we are talking about domestic drilling companies—that will simply have to close their doors because they don't have a drill stream.

Mr. SUCHMAN. Mr. Chairman, if I might add, the way this legislation is drafted, the Commerce Department has almost complete discretion, and the answer to your question is, they don't have to take price into consideration if they don't want to. So it is really a red herring.

Chairman CRANE. In your view, should a temporary duty suspension occur if the respondent has been so successful in dumping that it has driven a petitioner out of business, and that fact explains the lack of availability and, if not, how would you draw the line?

Mr. TASKER. Well, Mr. Chairman, it makes it sound as though the punishment for driving the company out of business is to force me out of business, too, and I think there has got to be a better way to deal with it than that. We went through that sort of a problem with semiconductors in the eighties. We had a relatively small

United States market share in DRAMs and a very large Japanese market share, and there was a great deal of concern on the part of some that the dumping that was found to exist in 1985 had, in fact, driven a large number of companies out of business.

Now the remedy for that was to make the Japanese producers charge much higher prices. It did stabilize what was left of investment in the United States, but the U.S. market share, and the U.S. industry did not raise its market share in semiconductors. Meanwhile, all of the computer companies were paying three, four, and five times what they had before for DRAMs. So, since that time, we have learned from that experience and worked with our colleagues in the semiconductor industry to come up with remedies to prevent dumping in the future in that industry that try to take more interests into account and are more sophisticated than was originally the case.

But I think you have to approach an issue like that with great caution because it is really a separate issue. Those were allegations that were made in the flat panels case, too, was that the Japanese dumping was keeping the AMLCD company from being able to secure financing to invest in a plant.

Those allegations were floating around, and some of them were stated in the final investigation report by the ITC. The point was, however, that whatever the case, you had another industry, another United States industry, that needed to compete, and that was the computer industry competing desperately with Japanese companies building computers in competition with us who had those screens. And to tell us we could not get those screens and compete because that one company had been put out of business, would have been a double victory, if you want, if you want to put it in those kinds of terms, for the aggressor, and that doesn't make any sense either.

So the producer interest and our interest, as manufacturers of downstream products, are both domestic interests that have to be taken into account, we think, and should be, and can be under a procedure like the one that your bill proposes. It is a balancing.

Mr. BLACK. I think the key point, if I could chime in, is that this is the interests of the U.S. industry, who is the consumer, is a legitimate interest. We are not saying interest should control or win all of the time. We simply feel it needs to be part of the equation. We want it to be a legitimate element to be considered.

With regard to the issue of driving somebody out of business, and we hear these arguments, and the truth is, if you have a case of predatory dumping, you are in another world, and we will oppose that as vigorously as anybody. That is totally improper, but I think it is important to keep in mind, as we have said in testimony, that people can be violating dumping laws or take action which will trigger dumping duties for behavior which is simple, normal business practices, not in an abstract sense, if it was in a domestic setting, as truly inherently unfair, and that is what makes it different. When you move into a situation where you have identified and can demonstrate that somebody is targeting somebody to put them out of business, you have got some other statutes that come into play, and we would support their vigorous use more than they have been historically.

Mr. SUCHMAN. Mr. Chairman, actually, if it is true the industry is no longer in business, there is already a statute which would grant a revocation of the order. You go to the International Trade Commission, and you plead changed circumstances, and one of the changed circumstances they have taken into account in revoking orders is that the industry no longer exists in the United States. So this, in effect, would not add any loophole to the law that doesn't, if you consider it a loophole, already exist.

Chairman CRANE. Mr. Rangel.

Mr. RANGEL. No questions, Mr. Chairman.

Chairman CRANE. Mr. Houghton.

Mr. HOUGHTON. Mr. Chairman, I just have one question. I came in a little late, and I didn't get the full thrust of what you gentlemen were talking about. But, Mr. Tasker, if I understand it correctly, Compaq does not want to be penalized in its production, and sale, and export of a product because of somebody else's action. If I understand correctly, that if somebody came in and put your company out of business, and then that same company who put you out of business was selling to systems manufacturers, that that would be all right?

Mr. TASKER. Mr. Houghton, I really don't understand your question. Can you try to—

Mr. HOUGHTON. Well, you will just have to figure it out. [Laughter.]

Mr. TASKER. You are suggesting that if a company came in and put me out of business that I would not complain. Well, of course, I would complain. What I am talking about is reaching a balance of interests between the company that is put out of business and another industry that is involved in the United States and needs to continue on as a competitor, and what is it going to do? Is it also going to suffer or can we make some other arrangements?

Mr. HOUGHTON. Well, I don't understand your answer. So that puts us on even ground. [Laughter.]

Mr. TASKER. There you go.

Mr. HOUGHTON. I guess what I am saying is that you are put out of business by a company from another country, and you resent it, but the systems people, to whom you have been selling your product still need that product, and they need it from the person that put you out of business. So, therefore, that is OK.

Mr. TASKER. Well, Mr. Houghton, the antidumping law is not a private right of action, and it is against countries, not companies, and it doesn't involve punitive actions like that. I mean, it is a compensatory statute under the GATT for redress of trade imbalances caused by what is an internationally recognized unfair trade practice, and that is the only relief for that. So it is not a question of whether it is OK or not. That is why, I guess, it is hard for me to respond very well to what you are saying.

Mr. HOUGHTON. Well, I guess it is OK if you are still in business. But if you are out of business because of the dumping procedures, then that is a different story.

Mr. TASKER. Well, it sounds to me, sir, as though we have a disagreement, and I hope we can work together to try to find a way to balance all of the interests of American industries in terms of coming up with remedies—

Mr. HOUGHTON. No, but you have a job, and your company is successful, and I have a job because I am here. However, there are other people who depend upon the laws of this land and the things we do to preserve their job. And so you must think about this, not only in terms of your company, but also the companies that are being violated by laws and by procedures from other countries they have no control over. That is the thing we are worried about.

Mr. TASKER. Absolutely, and we do.

Chairman CRANE. I have one final question for the panel, and this is on proposed Commerce regulations. Do you believe that Commerce's proposed regulation to deduct countervailing duties from the export price, if the importer has been reimbursed, may violate the subsidies agreement and antidumping agreement?

Mr. HICKEY. Congressman, I think a reimbursement would be a violation of it.

Chairman CRANE. Does anyone else have a comment?

Mr. SUCHMAN. Well, in the very least, it is a major change in practice, and I heard Secretary Esserman this morning describe it as a rebate. That is the first time I have heard anybody characterize the reimbursement of a duty as a rebate. It would seem to me, in the very least, before such a major change in practice is put into effect, it ought to be fully aired and not done by regulation. As I understand it, this is all based upon a statement in the Senate Finance Committee report on the Uruguay Round Act. It was certainly not anything this Subcommittee ever took a position on. It is not specifically dealt with in the statute, and it certainly could be argued that it is contrary to the international agreements concerned.

Chairman CRANE. Gentlemen, I want to thank you for your patience and your testimony today.

With that, we shall turn to our final panel, which is composed of representatives from U.S. industries who made use of the dumping laws. Robert J. Grow, chairman of the American Iron and Steel Institute and president and chief operating officer of Geneva Steel; John Boidock, vice president of Texas Instruments on behalf of the Semiconductor Industry Association; David Gridley, director of Sales and Government Affairs at the Torrington Co.; Terence P. Stewart, managing partner of the law firm of Stewart and Stewart; and two witnesses appearing on behalf of the Committee To Preserve American Color Television, who are Lawrence E. Liles, international representative of the International Brotherhood of Electrical Workers, and Timothy Regan, vice president of Corning-Asahi Video Products.

All right, Mr. Liles, we will commence with you as the first witness.

STATEMENT OF LAWRENCE E. LILES, INTERNATIONAL REPRESENTATIVE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO; ON BEHALF OF COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION

Mr. LILES. Thank you. My name is Larry Liles, and I am with the International Brotherhood of Electrical Workers. I am here representing over 15,000 union members of COMPACT, the Committee To Preserve American Color Television.

COMPACT is unique. It is one of the few union/management coalitions active in the international trade arena, and it is more unique in that we have shared voting and decisionmaking between labor and management, and all of our decisions and activities are by consensus.

I appreciate the Subcommittee being considerate in allowing both Tim and I to speak today. I will get to the point.

A strong workable antidumping law is critical to the American work force of the future. The television industry is a prime example of the need for antidumping protection. Color television was invented here in the sixties and seventies. It was seen as a high-tech industry, which would create the jobs for the future for American workers. Unfortunately, the governments of Japan and Korea had similar ambitions. They adopted policies for keeping their markets shut to U.S.-made goods, while they dumped products into our market.

Repeatedly, COMPACT has made the case against dumping at the ITC. Since 1976, the ITC has ruled five times that the American industry has been injured by unfair trade. All the while, we have witnessed the jobs in the industry destroyed by the thousands, and the number of U.S.-owned producers of color television picture tubes fall from 24 to none today.

The battle to save our industry has taken a lot of time, effort, and money. But, in the process, we have learned some valuable lessons. First, the Pacific-run suppliers of television tubes and sets persistently dump into export markets to gain market share, and the second is that a strong dumping statute is the only line of defense against such predatory practices.

My colleague, Tim Regan, will expand on these lessons.

**STATEMENT OF TIMOTHY J. REGAN, VICE PRESIDENT,
CORNING INC.; ON BEHALF OF CORNING-ASAHI VIDEO
PRODUCTS CO., CORNING, NEW YORK**

Mr. REGAN. Mr. Chairman, thank you for the opportunity to appear before you today. My colleague, Larry, has talked a little bit about the history. I am going to talk about the future of our industry.

Mr. Chairman, if you ask the average guy on the street where his television was made, he would probably tell you Japan or some Asian country, and he is probably wrong. Thanks to the dumping law, the television industry remains viable today, and I say viable. It is not thriving. Today, about 75 percent of the color picture tubes that are consumed in televisions are made in this country. Although a lot of television set production has moved off to Mexico, still, about one-half of it is made here. Only about 20 percent is imported from Asia.

Now, while the content today—U.S. content today—in televisions is still too low, we have made some progress. But the progress we have made in regaining share has been due, in large part, to enforcement of the dumping law, which has moderated, not eliminated, but moderated unfair trade.

Our future now depends, to a large part, on the existence of the dumping law and on enforcement of the dumping law. We are posed into a new era, the era of digital television. It has incredible

promise. Eventually, all 200 million television sets in the United States will be replaced. Whether those sets are going to be made here or in some foreign land, is going to depend, in large part, on what you do here on this Subcommittee and what the Commerce Department does on enforcement.

If the statute is weakened, more weakened than it has already been in the Uruguay round, firms are going to be reluctant to make the hundreds of millions of dollars of investments that have to be made, perhaps even billions of dollars, to make the United States a player in this industry. Without the defense of the dumping law, an investment in this sector of the company would be dangerous, at best.

One more point, Mr. Chairman. One of the weakening features we are concerned about is S. 2822. We would argue that that weakens the statute in a way which would make investment in this industry impossible, and we hope you will consider that as you move forward.

Thank you.

[The joint statement of Mr. Liles and Mr. Regan follows:]

**STATEMENT OF LAWRENCE E. LILES
INTERNATIONAL REPRESENTATIVE
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO
ON BEHALF OF COMMITTEE TO PRESERVE AMERICAN COLOR TELEVISION
AND TIMOTHY J. REGAN, VICE PRESIDENT, CORNING, INC.
ON BEHALF OF CORNING-ASAHI VIDEO PRODUCTS CO, CORNING, NY**

INTRODUCTION & SUMMARY

This statement presents the views of the Committee to Preserve American Color Television ("COMPACT") regarding: 1) the Department of Commerce proposed regulations to implement the Uruguay Round; and 2) H.R.2822, the Temporary Duty Suspension Act.

COMPACT is a coalition of labor organizations and firms in the U.S. color television industry, representing over 15,000 workers. COMPACT is represented at today's hearing by Lawrence E. Liles, International Representative, International Brotherhood of Electrical Workers, AFL-CIO and Timothy J. Regan, participating on behalf of Corning Asahi Video Products Co., Vice President and Director of Public Policy, Corning Incorporated.

Maintaining a strong anti-dumping law is a critical component of an effective trade statute and of vital importance to U.S. workers and companies. Effective unfair trade remedies are key to maintaining a base of support in the U.S. for an open world trading system. Moreover, effective unfair trade remedies provide the means to respond to injurious dumped imports, and thus constitute an integral component of a free-market trading system.

The U.S. color television industry is a leading example of the importance of trade policy to U.S. jobs. Because certain foreign markets were effectively closed to U.S. products, injurious dumping into our market from closed markets caused the loss of thousands of jobs and an entire segment of the domestic industry. As a result, there are few domestic suppliers to the television industry left today. However, these remaining firms are healthy – and on the threshold of a new era brought on by the advent of advanced television ("ATV"), high-definition television ("HDTV") and other formats of digital television. These producers of television glass, picture tubes, and sets must invest hundreds of millions of dollars in new production capacity in order to produce these larger sets. Without a strong, workable, anti-dumping law, no firm would put these sums at risk while its base business (conventional television) remains exposed to injurious dumping. Any future ATV or HDTV product is threatened by injurious dumping as well.

Therefore, in summary:

1) COMPACT believes that the Commerce Department regulations implementing the Uruguay Round Act should be carefully crafted to implement the compromises of the Act without undermining the effectiveness of the anti-dumping disciplines. Weakening the anti-dumping laws were a major objective of foreign dumpers during the Uruguay Round negotiations and subsequent Congressional implementation. These dumpers can again be expected to try to weaken U.S. anti-dumping law during the rulemaking process, and COMPACT will oppose these efforts. With respect to specific proposed regulations, COMPACT has included in this testimony several suggestions for improving the regulations on anticircumvention. These include comments on why investigations must be initiated promptly, should include verification, and should avoid inflexible definitions of class or kind of merchandise.

2) COMPACT opposes The Temporary Duty Suspension Act (H.R.2822) because it will undermine U.S. trade law. By suspending the anti-dumping and countervailing duties imposed against unfairly traded imports, this bill will put in jeopardy the relief from unfair trade that domestic industries have fought for years to obtain, and would reward those foreign companies that have used dumping tactics to drive U.S. producers out of business.

BACKGROUND ON COMPACT:

COMPACT was formed in 1976 to support a petition for import relief submitted to the U.S. International Trade Commission pursuant to Section 201 of the Trade Act of 1974. Since its founding, COMPACT and its members have participated in trade policy activities of interest to the domestic color television industry and its workers, including antidumping proceedings covering color television receivers from Japan, Korea and Taiwan and color television picture tubes from Japan, Korea, Singapore and Canada. COMPACT's Board of Directors include representatives of:

Industrial Union Department, AFL-CIO
 International Brotherhood of Electrical Workers, AFL-CIO
 International Union of Electronic, Electrical, Salaried, Machine and
 Furniture Workers, AFL-CIO
 United Electrical Workers of America, Independent
 Techneglas, Inc.
 Corning-Asahi Video Products

The labor members of COMPACT represent approximately 15,000 U.S. production workers engaged in the manufacture of color picture tubes and finished color television receivers for the principal manufacturers of televisions in this country, including, among others, Philips Consumer Electronics Company, a division of Philips Electronics North America Corp., Thomson Consumer Electronics, Inc. and Zenith Electronics Corp. These unions also represent production workers who produce articles for incorporation into finished color television receivers, including cabinets, electronic components and subassemblies and glass parts for color picture tubes.

The products of concern to COMPACT are: (1) color television receivers ("CTVs"), currently classified under subheading 8528.10 of the Harmonized Tariff Schedule of the United States ("HTSUS"); (2) color television picture tubes ("CPTs"), classified under subheading 8540.11, HTSUS; and (3) glass used in the production of CPTs, classified under subheading 7011.20, HTSUS.

HISTORY OF THE INDUSTRY:

COMPACT's members have had lengthy experience in seeking relief from unfairly traded goods under the antidumping law. Over the past twenty years, we've witnessed the constant erosion of production base, from 26 U.S.-wholly-owned firms to none. And, over the course of two decades of decline, the U.S. International Trade Commission ("USITC") has found five times that the industry has been injured by unfair trade.

The history is startling. In the 1960's and 70's, the production of color television receivers was seen as a high technology industry to which many Americans looked to provide the jobs of the future. U.S. companies created the television — the basic technological process for manufacturing the glass envelope was invented by Corning; and the picture tube was invented by RCA. Given that the tube is the most technically complex part of a television, the U.S.

industry believed that this world-class product would do very well domestically and overseas.

Although the U.S. industry grew rapidly, it was soon subject to dumping from Japanese firms. In fact, the history of this industry tells a devastating story of powerful multinational electronic giants from the Far East who were determined to dominate the U.S. market -- the largest and most open market in the world for color televisions and display devices. Because the Japanese market was effectively closed to foreign goods and investment, U.S. producers could not export to Japan, but were forced to license their technology to Japanese companies if they wanted to participate in the Japanese market. With the benefit of hindsight, it is clear that Japan's systematic plan was to promote its consumer electronics industry abroad through dumping, while protecting its industry at home through closed markets.

The inability of U.S. trade policy to deal effectively with this Japanese strategy undoubtedly emboldened producers from Korea and Taiwan to emulate Japan's tactics. A Japanese television antidumping order was entered in 1971, while orders against dumped color televisions from Korea and Taiwan were entered in 1984. Antidumping orders covering CPTs from Japan, Korea, Singapore and Canada (Mitsubishi) were entered in 1988. U.S. industry sought and won relief against unfair trade practices several times throughout that period, but thousands of U.S. manufacturing jobs were lost in the process, as U.S.-owned factories were closed.

1) THE COMMERCE DEPARTMENT REGULATIONS IMPLEMENTING THE URUGUAY ROUND ACT:

The Commerce Department must implement the international obligations of the United States as enacted by Congress. These regulations, however, should be constructed in a fashion so as to accomplish the intended purpose of the antidumping law -- the elimination of injurious sales made at less than fair value -- swiftly and decisively.

To that end, it is critical that the regulations do not weaken the discipline of the existing dumping statute. Weakening the U.S. antidumping law was a major objective of foreign suppliers during the Uruguay Round negotiations and subsequent legislative implementing process. Entities related to foreign suppliers can be expected to try again to weaken U.S. antidumping law during the rulemaking process. COMPACT will oppose any attempts to manipulate the rulemaking process in an effort to compromise the decisions that Congress made in the Act.

It is rare that any group is ever completely satisfied with a piece of legislation. Such is the case with the Act. Certainly, COMPACT recognizes ways in which the Act could have been improved. For example, we believe that the DOC should take specific measures to ensure that the cost of duties are passed on to the ultimate purchaser in situations where the importer is related to the exporter. With respect to the issue of "standing", an affirmative statement of support by either labor or management should constitute support for the petition by a particular company. With respect to "sunset", we believe that the statute should indicate that dumping and injury is likely to continue or recur if certain evidence is presented in the review proceeding. In addition, the termination of a dumping order should be conditioned upon the signing of an agreement by the foreign producers subject to the order in which they certify that dumping will not recur, subject to the automatic reimposition of increased duties should dumping recur.

Even though we continue to believe that these issues are critical, we will not attempt to re-open them in the context of what should be a straight-forward rule-making process. We will simply ask that throughout the rulemaking process, the intent of Congress is strictly implemented.

While we are still in the process of a comprehensive review of the proposed regulations, we can comment now on at least a few of the proposed rules. For example, one of the more troublesome shortcomings of the antidumping law and its administration concerns the ability of Commerce to implement the law's anticircumvention provision. This problem has been particularly acute for the domestic television industry and its workers. There are several important ways in which the proposed regulations could be improved.

- **ANTICIRCUMVENTION INVESTIGATIONS MUST BE INITIATED PROMPTLY**

The regulations should specify that the Department will normally decide whether to initiate a circumvention inquiry within 45 days after a circumvention application has been filed. In addition, the regulations should provide that the normal period for a circumvention inquiry will cover the four most recently completed fiscal quarters as of the month preceding the month in which the circumvention application was filed. These two provisions will ensure that a respondent is not permitted to alter its operations after a circumvention application has been filed simply to avoid a finding of circumvention.

The requirement for prompt initiation of an anticircumvention investigation has its roots in present regulations. To ensure that original antidumping duty investigations are conducted expeditiously and to minimize any injury to the domestic industry, the statute provides that the Department must decide whether to initiate an antidumping duty investigation within 20 days of the filing of a petition. Pursuant to its proposed regulations, Commerce has also proposed that the period of investigation in antidumping investigations will normally be the four most recently completed fiscal quarters as of the month preceding the month in which the petition was filed. See 19 C.F.R. § 353.204(b). Requiring the prompt initiation of antidumping duty investigation and using a time period that precedes the filing of the petition helps to ensure that a foreign producer does not temporarily alter its prices to avoid a finding of dumping in an original investigation.

Comparable procedures should be adopted for circumvention inquiries. First, to ensure that domestic industry receives prompt relief from circumvention tactics, the Department's regulations should provide that the Department will normally initiate a circumvention inquiry within 45 days after the application is filed. While the statute does not provide a mandatory time period for initiating these inquiries, the statute does express an interest in ensuring that these inquiries are promptly completed. 19 U.S.C. § 1677(f).

Second, paralleling the regulatory provisions relating to the period of investigation in original investigations, the regulations should provide that the normal period for a circumvention inquiry will cover the four most recently completed fiscal quarters as of the month preceding the month in which the circumvention application was filed. If the period of inquiry includes a time period after the application is filed, the respondents may be permitted to alter temporarily certain assembly or manufacturing operations to avoid the appearance of circumvention. Accordingly, the period of inquiry should cover a period of time preceding the application. If a respondent then permanently alters its operations so that it is no longer circumventing an antidumping or countervailing duty order, it will be able to demonstrate this during an administrative review, just as a respondent is permitted to demonstrate that it is no longer dumping during an administrative review.

- **ANTICIRCUMVENTION INVESTIGATIONS SHOULD INCLUDE VERIFICATION**

The regulations should provide that the Department will normally conduct verification in a circumvention inquiry. Verification is critical to these inquiries because the information submitted is typically not reviewed or analyzed by the Department in any other phase of the proceeding.

In all original antidumping and countervailing duty investigations, the Department is required to conduct verification. Verification is critical because the Department has never had the opportunity to review and analyze the respondent's data and so cannot determine whether the data is accurate and complete without verification. In circumvention inquiries, a respondent is required to submit data that is necessarily distinct from the data that is gathered in an original investigation or in administrative reviews. For example, while a respondent will submit home market prices, U.S. prices, and related selling expense in original investigations and administrative reviews, the information submitted in a circumvention inquiry generally pertains to the level of investment, employment levels, a description of the production process performed in different markets, and the amount of value added in either a third country or the U.S. Accordingly, the Department's regulations should provide that verification will normally be undertaken in circumvention inquiries to ensure that the data submitted is complete and accurate.

- **PRESUMPTIONS SHOULD BE ESTABLISHED CONCERNING THE INHERENTLY LIMITED NATURE OF ASSEMBLY OPERATIONS.**

A key Commerce Department determination is whether the process of assembly or completion is minor or insignificant. The regulations should establish a presumption that simple assembly is minor or insignificant, and a corresponding presumption that production (or completion as used in the statute) is not minor or insignificant. Either presumption could be overcome by the respondent by providing evidence to the contrary.

While application of the above-stated statutory factors to a simple assembly operation in the U.S. or third country should lead to a conclusion that the assembly process is minor or insignificant under the statute without a presumption, establishing these presumptions would be consistent with the statute, appropriate in light of Congressional intent, logical in theory and practice, efficient for Commerce to administer, and would lend a beneficial level of predictability to investigations for respondents.

Both presumptions would be fully consistent with the five statutory factors Commerce must consider as these factors largely focus on the level of activity performed in the U.S. or a third country. Moreover, these presumptions are especially appropriate in light of Congress' intent in adopting the new statutory requirements to include within the scope of antidumping duty orders products in which only minor assembly occurs in the U.S. or a third country (S. Rep. No. 412 at 81).

Given the fundamental difference between assembly and production, these presumptions are logical. Assembly consists of simply joining parts together. By contrast, production (or completion as used in the statute) consists of a process whereby the chemical composition, mechanical properties, and/or physical appearance of materials are transformed in a substantial manner. None of these changes occur in simple assembly. For example, attaching the wheels, frame, derailleurs, and other components together to create a bicycle is simple assembly. By contrast, transforming carbon steel into pipe through heating, rotary piercing, stretching, straightening, and cutting is production. Given the vast difference in the nature of assembly versus production activities, it is logical to establish a presumption of minor or insignificant processing where only assembly occurs, and

also establish a presumption of not minor or insignificant processing where production occurs.

The establishment of these presumptions would allow Commerce to avoid wrestling with amorphous, difficult to measure statutory factors in every case. The presumptions would also put respondents on notice that setting up a simple assembly operation in the U.S. or a third country is not a viable means of circumventing the order. By establishing a level of predictability as to how Commerce will view assembly operations, fewer attempts at circumvention would likely occur.

- **COMMERCE'S REGULATION SHOULD AVOID INFLEXIBLE DEFINITIONS OF CLASS OR KIND OF MERCHANDISE**

Commerce is required to promulgate regulations in furtherance of the statutory requirement that the merchandise circumventing an order be of the same "class or kind" as the merchandise subject to the order. This statutory requirement should be broadly construed to include within the same class or kind or merchandise a component and a finished product. This construction is necessary to effectuate Congress' intent, and is fully consistent with the terms of the statute, Commerce's past practice and judicial precedent.

Under the new statutory provision on circumvention through a third country, an affirmative circumvention finding is dependent on a finding by Commerce that the "merchandise imported into the United States is of the same class or kind as any merchandise produced in a foreign country that is the subject" of an antidumping or countervailing duty order. In the typical third-country circumvention case, where components are exported from the country subject to the order to a third country where they are assembled into the product subject to the order and exported to the U.S., a narrow definition of "class or kind" is adequate since the product entering the U.S. from the third country is by definition the same product subject to the order.

A narrow definition of class or kind, however, would deny relief in the less common, though equally problematic situation of "diversionary circumvention" in which the product subject to the order is exported from the country subject to the order to a third country where it undergoes further processing and is then shipped to the United States. In such a case, the "class or kind" definition must be construed as including components and the finished product in the same "class or kind" or merchandise in order for Commerce to make an affirmative circumvention determination. If "class or kind" is not defined to include a component and a finished product, a remedy will be denied in every instance of diversionary circumvention other than where the activity in the third country is trivial.

A broad interpretation of "class or kind" was intended by Congress. The prior circumvention statute did cover diversionary circumvention and the new statute does not indicate any intent to depart from the prior statute on this point. That diversionary circumvention was covered under the prior provision is indisputable. In the Conference Report to the Omnibus Trade and Competitiveness Act of 1988, Congress emphasized that the circumvention provision includes the common form of circumvention and diversionary circumvention. The Report states,

it is made explicit that the provision applies both in cases where the order is on the merchandise shipped to the third country for completion or assembly (diversion) and where the order is on a final product, parts and components of which are sent from the country subject to the order to the third country for assembly or completion (circumvention).

H.R. Rep. No. 576, Cong., 2d Sess. 600 (1988) (emphasis added). Since neither the Uruguay Round Agreements Act nor its legislative history indicate an intent to

not cover diversionary circumvention, Congress expressed no intent to alter the law in this regard.

Commerce should specify in its regulations that in cases of diversionary circumvention, components and a finished product may be considered to be of the same class or kind of merchandise. The other statutory requirements – that the processing not be minor or insignificant and that the value of the merchandise produced in the foreign country to which the antidumping duty order applies is a significant portion of the total value of the merchandise exported to the U.S. – will ensure that the statute will provide a remedy only for instances of genuine circumvention.

2) COMPACT OPPOSES THE TEMPORARY DUTY SUSPENSION ACT, "HR2822"

Although there are only a few domestic suppliers to the television industry left, these firms are healthy – and on the threshold of a new era brought on by the advent of advanced television ("ATV"), high definition television ("HDTV"), and other forms of digital television. The migration to larger and higher resolution screen sizes for HDTV is placing huge pressures on producers of glass parts for CPTs, CPT producers, and set manufacturers. If demand for HDTV develops, hundreds of millions of dollars in new capacity will need to be added over the next few years. In fact, money is already being spent for expansion in glass and tube production to meet industry needs. Thousands of new jobs could be created and protected. This investment could be delayed or stopped, however, if foreign companies are allowed to dump into the U.S. market with impunity.

Glass and tube production is now the anchor that holds CTV production in North America. The assembly of CTV sets is not capital-intensive and can easily migrate to other locations in pursuit of cheap labor or components. Unless new investments in tube and glass facilities are made here, the long-term viability of the American color television industry and the jobs it creates remain in doubt. Fair trade is critical to the decision of these producers to make the necessary commitment of capital to continue this industry.

Given the enormous commercial stakes associated with ATV, there is no reason to expect that any foreign government-business team now involved in the development of ATV will not resume their dumping tactics. The history of dumping in the television industry combined with the threat of H.R.2822, give little comfort to producers who are considering investing hundreds of millions of dollars in the next generation of color picture tubes, sets and associated glassware nor for American workers whose jobs are vulnerable to unfairly priced imports.

To allow market signals to drive the industry, the antidumping orders must be maintained. The apparent effect of H.R.2822 would be just the opposite – foreign dumpers will be encouraged to resume dumping. At this critical juncture in the history of our domestic industry, we need to discourage injurious pricing and to encourage continued investment in the U.S.

Specifically, the Temporary Duty Suspension Act would be disastrous to the domestic television industry for following reasons:

- H.R.2822 would subject the domestic CTV industry to dumping again at a time when the domestic industry is beginning to finance the development of advanced television equipment technologies, specifically ATV. ATV requires a long-term vision and investment. It will only be a relatively small high-end segment of the existing color television market for the next several years, while conventional color televisions will continue to dominate the market. The competitive position of the conventional color television industry and their

suppliers in the U.S. will, therefore, be one of the largest determinants of the prospects for meaningful participation in ATV. For this reason, the maintenance of existing duties on CTVs and CPTs becomes critical. Unless domestic producers are permitted to earn a fair return on present sales, they will be unable to generate the financial resources required for long-term participation in the evolving industry.

- The notion that shortages of products under an antidumping order will arise to the detriment of U.S. consumers is a basic misconception. Even in the unlikely event that U.S. domestic industry might temporarily be unable to supply a given product to a customer, imports covered by an anti-dumping order are free to enter the U.S. market, while foreign producers continue to pay any antidumping duties necessary to offset injurious pricing. The antidumping law does not limit the volume of imports that may enter the U.S., as a quota, or voluntary restraint agreement does.
- A temporary duty suspension mechanism cannot be effectively administered, as the Commerce Department has clearly stated. Proponents of a temporary duty suspension provision argue that it would be used only where U.S. entities require products they can't obtain in the U.S.. But what is "short supply" in the context of COMPACT-initiated orders? For example, if phosphor, a critical element in the manufacture of CPTs were in short supply, thus constraining the capacity to produce CPTs, would the duties on CPTs be suspended? What if there were a shortage of glass for CPTs, thus constraining the capacity to produce CTVs, would the duties on CTVs be suspended? High-tech industries experience "shortages" from time to time which have nothing to do with current orders on a product or any relevant upstream product. Also, foreign suppliers could manipulate our market, withholding products now supplied under antidumping orders and thereby inducing "shortages". H.R. 2822 establishes no objective standards by which to identify when a short-supply situation arises, or subsequently is corrected. Under these circumstances, administration of a short-supply provision would be unavoidably arbitrary and a bureaucratic nightmare, diverting precious resources from enforcement of the antidumping law.
- It is not possible to "temporarily" remove or reduce duties without encouraging foreign producers to continue dumping. Simply put, the purpose of foreign dumping is to drive U.S.-owned domestic firms out of business. Any resulting "shortage" in supply is a **direct** result of U.S.-owned factories closing as a result of foreign dumping. In fact, we would predict that some of the companies found guilty of dumping and thus subject to an anti-dumping order, would be the very companies helping to petition for duty suspension if this bill is enacted. The perverse effect of H.R. 2822 would be to reward those foreign dumpers that have driven U.S. producers out of business.

Chairman CRANE. Mr. Boidock.

STATEMENT OF JOHN BOIDOCK, VICE PRESIDENT, TEXAS INSTRUMENTS; ON BEHALF OF SEMICONDUCTOR INDUSTRY ASSOCIATION

Mr. BOIDOCK. Thank you, Mr. Chairman. I am John Boidock, vice president, Government Relations, with TI, Texas Instruments. Thank you for this opportunity to appear before you and present the views of SIA, the Semiconductor Industry Association.

Before addressing the antidumping laws, however, I would like to briefly describe the semiconductor industry; in part, to give you a better idea why these laws are so important to us.

U.S. semiconductor makers employ 260,000 highly trained, well-compensated people nationwide. Our products are the enabling technology behind nearly a \$400 billion U.S. electronics industry, employing 2.5 million Americans. The semiconductor industry devotes an average of 20 percent of our revenues to capital spending and another 11 percent to R&D, among the highest of any industry, and the semiconductor industry is truly a global industry, with roughly one-half of our revenues derived from overseas.

Clearly, it has been in our interests and in the interests of this country to promote free trade and open world markets. SIA works very closely, and has worked very closely in the past with this Subcommittee and the administration to fashion antidumping provisions that are appropriate in response to the Uruguay round changes. We have been in the forefront pushing for zero tariffs on our products worldwide. Unfortunately, market access barriers continue to exist in wrong countries, and one of the most severe cases is Japan. Such barriers have historically led to dumping. In the mideighties, 9 of 11 U.S. dynamic random access memory producers, DRAMs, were driven out of the business by Japanese dumping. There is no question in my mind that without strong antidumping laws, this could happen again. It would be a disaster for our industry and our customers.

The world semiconductor industry is growing explosively with the expectation of a doubling in size of the industry before the year 2000 to \$300 billion. To achieve this, the world industry must build at least 100 new production facilities. We call them wafer fabs. Each one of them costs between \$1 and \$2 billion and 70 percent of these fabs will be obsolete within 3 years because of the short product life cycles of our industry. Indeed, we may build to overcapacity in response to this demand. It is very hard to find the right equilibrium, but in this intensely competitive environment, dumping is a real danger. In just the last 6 months, prices on four megabyte DRAMs have dropped from approximately \$12.50 each to \$6.50 each, creating a boon for consumers and, in turn, greater demand for our products.

So what have we learned since the eighties? We have learned that antidumping duties have worked. To suspend them even temporarily, as proposed in H.R. 2822, would reward dumpers who have driven domestic producers from the market. It happened to DRAM producers in the eighties and it can happen again. And, if it does, it can happen very quickly.

In general, we support the Commerce Department's proposed antidumping regulations. They are consistent with the requirements of the law as written by this Subcommittee and consistent with the World Trade Organization's Antidumping Agreement.

SIA also believes the antidumping provisions of the 1991 United States-Japan Semiconductor Agreement should be maintained in a new agreement. These provisions serve as an insurance policy against renewed dumping.

Last, Mr. Chairman, Texas Instruments has been a strong supporter for open markets throughout the globe. As a leader of the Alliance for GATT now, TI led the business community's coalition to gain passage of the Uruguay round legislation. That legislation achieved a masterful balance for U.S. antidumping laws, and we are concerned the changes contemplated by this bill will destroy that balance.

Thank you, Mr. Chairman, for this opportunity, and I would be pleased to answer any questions.

[The prepared statement follows:]

**STATEMENT OF JOHN BOIDOCK
VICE PRESIDENT, TEXAS INSTRUMENTS**

**ON BEHALF OF
THE SEMICONDUCTOR INDUSTRY ASSOCIATION**

**HEARING ON DEPARTMENT OF COMMERCE
PROPOSED ANTIDUMPING REGULATIONS
AND OTHER ANTIDUMPING ISSUES**

APRIL 23, 1996

I appreciate this opportunity to appear before the Subcommittee on Trade of the Committee on Ways and Means to present the views of the Semiconductor Industry Association ("SIA") on the operation of the U.S. antidumping law.

Before going into greater detail on SIA's position on the antidumping law, I would like to take a minute to give the Subcommittee a sense of the U.S. semiconductor industry.

The U.S. Semiconductor Industry

Semiconductors are an increasingly pervasive aspect of everyday life, enabling the creation of the information superhighway and the functioning of everything from automobiles to advanced medical equipment. Semiconductors are also the linchpin underlying this nation's advanced military weapons systems. A growing proportion of the value of these systems is dependent upon electronics products -- up to 40 percent in some cases. The current design of the F-16 Fighter, for example, includes 17,000 electronics components. They are also intrinsically important in radars, weapons guidance and control systems.

U.S. semiconductor makers employ 260,000 people nationwide. Their products are the enabling technology behind the nearly \$400 billion U.S. electronics industry, which provides employment for 2.5 million Americans.

The U.S. semiconductor industry is currently the world market share leader, with 1995 world sales reaching \$59 billion, representing almost 41 percent of the \$144 billion world market. Moreover, the world semiconductor market is expected to double by the year 2000, with projected sales of over \$300 billion.

U.S. semiconductor producers are highly committed to maintaining their lead in both semiconductor manufacturing and technology. The U.S. semiconductor industry devotes on average 20 percent of its revenues to capital spending and another 11 percent to research and development -- among the highest of any U.S. industry.

While investing heavily in the industry's future competitiveness and technological capabilities, SIA members also have always actively sought to secure foreign market access for U.S. products. Because the semiconductor industry is so global in nature -- roughly half of the U.S. industry's revenues are derived from overseas sales -- SIA has been dedicated since its inception to promoting free trade and opening world markets.

For example, the U.S. industry has been in the forefront of efforts to eliminate tariffs on semiconductors and related products worldwide. At SIA's urging, both the United States and Japan eliminated their semiconductor tariffs in the mid-1980s. During the Uruguay Round, the U.S. industry succeeded in convincing Korea to eliminate its chip tariffs. Today, SIA is pushing for semiconductor tariff elimination as part of the proposed Information Technology Agreement.

However, the elimination of tariffs and other traditional trade barriers has proven to be insufficient to ensure full market access in key markets, particularly Japan, the second largest semiconductor market in the world. Japanese Government protection of its home market and toleration of anticompetitive practices have permitted Japanese firms during periods of market downturns to dump excess semiconductor production in open markets like the United States. In the 1980s, nine of eleven U.S. producers of commodity memory semiconductors (DRAMs) were driven out of the DRAM business as the result of Japanese dumping.

Why Dumping Occurs

Dumping frequently makes excellent commercial sense even if no profits are earned on export sales. It is a mechanism through which companies may achieve full (and thus most efficient) utilization of their plants. Particularly in capital-intensive industries like semiconductors, unit costs of production drop dramatically as output volume increases, and all producers are under economic pressure to run their plants at as close to full utilization as possible. Dumping enables producers to maximize utilization rates by increasing output, but without causing domestic prices to fall, since the surpluses are disposed of outside the home market. This cannot occur in an open market -- market barriers must also exist to prevent the dumped product from being re-exported to the home market. While other factors may also give rise to dumping, especially between countries with significantly different economic structures, the existence of distortions in the home market of a dumping industry often explains why dumping occurs.

The Role of Antidumping Measures in the World Trading System

The General Agreement on Tariffs and Trade (GATT), the system of rules that governs the world trading system, provides that dumping "is to be condemned if it causes or threatens to cause material injury to an established industry" or "materially retards the establishment of a domestic industry." The WTO Antidumping Agreement (recently renegotiated in the Uruguay Round) permits signatories to take remedial action against dumped imports, and prescribes international rules for the conduct of antidumping actions.

Antidumping rules play a vital role in maintaining the delicate balance that the WTO system must strike between the goal of trade liberalization and its members' national political and economic interests. They reduce the friction arising out of competition between economies with fundamentally different structures. In the absence of effective remedies against dumping, political support for the progressive dismantling of trade barriers that is the WTO's fundamental mission would erode. The alternative to internationally-agreed antidumping rules is an uncontrolled, ad hoc regime of tariffs, quotas, and non-tariff barriers.

The Role of the Antidumping Law in U.S. Trade Policy

The antidumping law and the related countervailing duty law provide a limited mechanism for relief to industries injured by dumping and subsidies. The relief provided is prospective in nature and does not compensate for damage done before the duties are imposed. Moreover, the trade remedy laws only address the effect of dumping and subsidies in the U.S. market. They do not address the harm done to U.S. exporters in third country markets where they also compete against dumped and subsidized exports. However, until such time as all subsidies and other trade-distorting practices are eliminated world-wide, these laws are the only effective mechanism for relief for U.S. industries facing unfair international competition.

History of Japanese Dumping of Semiconductors

As outlined in a recent study by the Economic Strategy Institute, Japanese efforts to develop its semiconductor industry led to trade friction and dumping in the early to mid-1980s:

Trade friction between the United States and Japan was a natural outgrowth of the Japanese system that generated excess domestic capacity and restricted imports. Knowing full well that higher volume was the key to lower costs, Japanese firms expanded production capacity as fast as possible, outspending their U.S. counterparts in absolute terms beginning in 1981. The fixed costs resulting from this capacity buildup could only be covered by selling excess production in the U.S. market, but to gain market share in the United States, Japanese firms were forced to drop prices below the cost of production. The Japanese firms dumped chips into the United States and maintained artificially high prices at home, a combination that undermined the competitive position of American firms and drove all but two U.S. DRAM makers out of [that] business.

ESI, Prospects for U.S.-Japanese Semiconductor Trade in the 21st Century at 9 (April 1996).

Dumping was also encouraged by the nature of the semiconductor business cycle, which encourages massive capital spending during periods of growing demand, which quickly can result in the creation of overcapacity during cyclical downturns, leading in turn to dumping of excess production. Because it takes on average 18 months to build a new fabrication plant, industry capacity is often far below demand during the early phase of boom periods. Moreover, since the end of any period of high demand cannot be predicted, capital spending plans may well outlive the boom period, as happened in the mid-1980s. Thus, high levels of production may continue during periods of slumping demand, due in part to high fixed production costs and the need to continue plant operations to realize amortization benefits. This cyclical problem of building up capacity in booms, and dumping during busts, came to a head in the early to mid-1980s.

In 1983-84, world demand for semiconductors (including EPROM and DRAM memory devices) soared, encouraging dramatic investment in production facilities in Europe, Japan and the United States. Capital spending led to significant overcapacity in 1984-85, just as demand began to slump. Despite falling computer shipments, chip makers maintained production at full capacity. In Japan, a protected home market enabled chip manufacturers to maintain domestic prices; excess production was dumped on world markets at heavily discounted prices, often well below the cost of production. Huge losses were experienced by both the Japanese and U.S. industries, with estimated Japanese losses as high as \$4 billion in 1984-85 alone. Meanwhile, nine of eleven U.S. chip producers were driven out of the DRAM business. One U.S. producer, Mostek, was driven out of business altogether.

At the semiconductor industry's request, the U.S. Department of Commerce initiated antidumping investigations into 64K DRAMs and EPROMs. Later that year, the U.S. Government self-initiated an investigation into 256K and future generation DRAMs. The 64K DRAM case resulted in antidumping duties of up to 35 percent. While the 64K EPROM and 256K DRAM cases were settled by suspension agreements which included provisions to prevent Japanese dumping in both the U.S. and third country markets, the Department of Commerce issued determinations in these cases finding dumping margins as high as 188 percent (in the case of EPROMs). These suspension agreements were incorporated by reference in the 1986 U.S.-Japan Semiconductor Agreement.

The 1986 Semiconductor Agreement consisted of three main provisions: (1) improved access to the Japanese market for foreign-produced semiconductors (2) the prevention of dumping in the United States; and (3) the prevention of dumping in third country markets. In addition, separate suspension agreements were signed for DRAMs and EPROMs. Unlike past U.S.-Japan agreements, the Agreement and the related suspension agreements did not impose quantitative restraints on imports of Japanese semiconductors, nor did it impose a price floor on imported chips. Rather, its objective was to induce Japanese producers to sell at prices which were cost-based, where the lowest prices would be offered by the firm with the lowest costs. The Agreement also established a monitoring system to provide early warning of renewed dumping.

The 1987-89 Chip Shortage -- The Impact of Successful Dumping on Industrial Users

In the aftermath of the abrupt market exit of most non-Japanese producers of DRAMs in 1985, U.S. and other foreign electronics systems producers who were large consumers of DRAMs began to encounter a variety of major problems in obtaining DRAMs from Japanese suppliers. A shortage of DRAMs materialized in 1987-89 as Japanese DRAM producers, with control of 90 percent of world DRAM production, began jointly regulating their output in order to raise the price of DRAMs.

In April 1986, MITI disclosed that it would implement a new system of regulating Japanese semiconductor production and pricing. The most important feature of this system was the institution of the so-called "guidepost" system utilized by MITI to maintain price and output stability in other capital-intensive industries. Under this system, a committee established within MITI would meet regularly with semiconductor producers to discuss their production plans for the coming quarter and compile production "guideposts" -- indicative production levels whose purpose was to curb overproduction and to stabilize prices. In February 1987, MITI issued administrative guidance to Japanese producers to curtail production by 10 percent. Administrative guidance to make further production cutbacks was issued later that year.

SIA publicly opposed the Japanese Government's production controls and efforts to impose a price-floor on semiconductor prices, declaring them to be inconsistent with the market-oriented terms of the 1986 Agreement. In 1987, the SIA Board of Directors passed a resolution calling for existing sanctions imposed earlier that year against Japan to be maintained until the increased market access provided for under the Agreement was achieved and the Japanese Government-imposed floor prices and production controls had been eliminated. SIA had earlier opposed a Japanese Government proposal to impose quantitative restrictions on exports of Japanese semiconductors. Finally, in November 1987, the Reagan Administration, with the public support of SIA, lifted sanctions earlier imposed on Japan for third country dumping, in part on assurances from MITI that there would be no further production controls or floor prices on Japanese semiconductors.

In March 1988, a GATT panel formed in response to a complaint brought by the European Community upheld the market access and third country dumping provisions of the 1986 Agreement. However, the panel did find that the Japanese Government's "coherent system" of export restrictions of semiconductors, including the production controls and other features of the MITI guidepost system, violated GATT rules against quantitative restrictions.

Once Japanese dumping was halted, the U.S. industry began the road to recovery. U.S. producers were able to reestablish significant DRAM production and save tens of thousands of domestic jobs. As non-Japanese production rebounded, the supply and demand relationship stabilized, permitting a return to full competition in the DRAM industry. Several U.S. companies were able to re-enter the market and expand their production. DRAMs continued their normal price decline of 30 percent per year related to performance. Korean and Taiwanese producers entered the market. World DRAM prices today are lower than ever and international competition among producers remains intense. The result was pro-consumer.

Similarly, in the case of EPROMs, once Japanese dumping was halted, the U.S. industry was able to rebound. Substantial world market share was regained with the advent of FLASH EPROM chips, a technological development made possible only because U.S. producers were provided relief from the injury caused by unfairly traded imports.

If the relief provided for under the U.S. antidumping law had been suspended -- even temporarily -- during the mid to late 1980s, U.S. DRAM production would never have recovered, Japanese producers would still be able to manipulate the price and availability of DRAMs, and U.S. producers would not have developed new products such as FLASH EPROMs. This would have damaged not just the U.S. semiconductor industry, but U.S. industrial users of semiconductors as well.

The "chip shortage" of the late 1980s demonstrates how world electronics markets will behave in the future if dumping is left unchecked. Japanese producers were able to manipulate the price and availability of DRAMs, with damaging effects on many non-Japanese electronics systems producers, precisely because they had destroyed or marginalized all of their competitors. In product sectors where this did not happen, and where a significant non-Japanese supply base remained -- notably EPROMs -- normal competitive market conditions continued to prevail. The DRAM shortage of 1987-89 was simply another manifestation of the market distortions possible when dominance by a cartel had been achieved.

Antidumping deterrence measures, by ensuring the survival of significant non-Japanese production potential constitute an important form of insurance against future chip shortages. While current market conditions make renewed dumping unlikely in the near term, the history of Japanese dumping of semiconductors and the resulting anticompetitive behavior in DRAM production and pricing demonstrate the importance of maintaining a strong and effective U.S. antidumping law, as well as maintaining the deterrence against dumping provided by the antidumping provisions of the 1991 U.S.-Japan Semiconductor Agreement.

The Threat of Renewed Dumping

Although there has been no allegation of Japanese dumping under the 1991 U.S.-Japan Semiconductor Agreement, this is most likely due to tight world market conditions which have existed through late 1995. The antidumping provisions of the Agreement will not be tested unless and until there is a very sharp decline in prices for a particular semiconductor product.

The semiconductor market is very cyclical in nature, as recent sharp downturns in the prices of DRAMs clearly shows. Moreover, it is an industry where products have very short life cycles and one in which change can be very rapid. All of this makes renewed dumping a possibility.

The world semiconductor industry is currently experiencing a period of explosive growth. The global chip industry is expected to more than double in size to approximately \$300 billion by the turn of the century. Meeting the demand generated in the next five years will require the construction of over 100 new production facilities or "fabs," each of which will cost anywhere from \$1 billion to \$2 billion -- and 70 percent of which will be obsolete within three years of their construction due to the short product life cycles of this dynamic industry. Capital expenditures deemed necessary to boost competitiveness may lead in fact to overcapacity and dumping. Several factors contribute to these capacity swings. Most notably, forecasting demand beyond a few months is highly uncertain, and periods of demand start and end abruptly. As a result, periods of overcapacity closely follow periods of undercapacity in the semiconductor industry.

The emergence of Korea and Taiwan as major producers of semiconductors is adding significantly more capacity, which in turn further increases the risks of dumping should a downturn take place in any product segment of the world semiconductor market. However, while Korean and Taiwanese production could help tip the market into overcapacity, the market leaders in DRAMs remain Japanese producers, who have 39 percent of the world market for semiconductors overall and 49 percent of the world DRAM market.

Comments on Proposed Department of Commerce Antidumping Regulations

Given the semiconductor industry's experience with dumping in the 1980s, the industry remains very concerned that an effective antidumping remedy remain available. SIA worked closely with USTR and the Department of Commerce during the Uruguay Round negotiations to ensure that our trade laws were not adversely affected. We also worked closely with the Ways and Means and Finance Committees during the drafting of the implementing legislation to see that U.S. law was not unnecessarily weakened. SIA was a strong supporter of the final implementing legislation because this Committee did an excellent job in ensuring that our laws against unfair trade remained strong and effective.

Now that the Department of Commerce has issued proposed antidumping regulations, SIA believes it is essential to again ensure that the effectiveness of the antidumping law be fully maintained. In our view, the draft regulations recently proposed by the Department of Commerce to implement the statutory changes to the antidumping law made by the Uruguay Round implementing legislation are, with a few exceptions, consistent with the requirements of the new law and the WTO Antidumping Agreement. Overall, they balance the need for rigorous investigations with the costs to the parties of participating in the process. They also improve the transparency of the administration of the antidumping law. Of course, the Uruguay Round agreements did add several additional requirements which have increased significantly the costs to domestic industries of bringing antidumping cases.

With these general comments in mind, SIA would like to comment briefly on a few areas where further refinement of the draft regulations would be in order.

1. Start-Up Costs

The WTO Antidumping Agreement included a new requirement that cost calculations in antidumping cases (for both constructed value and cost of production purposes) be adjusted appropriately for start-up operations. To implement this requirement, the new law provides that, in calculating cost of production and constructed value, an adjustment may be made to take into account that a firm may experience unusually high costs when it is "starting up" a new product or new production facilities. Under the new law, the start-up adjustment is to reflect the lower costs at the end of the start-up period.

These provisions are of particular concern to the semiconductor industry because semiconductor production costs decline rapidly throughout the life of the product. It is therefore essential that the regulations clearly provide that only costs directly associated with manufacturing

the product be considered start-up costs subject to adjustment. Pre-production research and development costs in particular should be excluded from the definition of start-up costs.

2. Identifying Level of Trade

In the Uruguay Round implementing legislation, the antidumping law was modified to significantly enhance the importance of any difference in "levels of trade" when comparing sales prices in the exporter's home market and in the U.S. market. For instance, a foreign producer may sell directly to retail end users in the home market, while relying on wholesale distributors to sell to end users in the U.S. market. Where a producer performs different functions in selling to different classes of customers, such as wholesalers and retailers, the Department of Commerce may find different "levels of trade" to exist. The new statute provides detailed instructions for determining whether an adjustment for differences in levels of trade is warranted, and for calculating the proper amount of the adjustment.

The proposed regulations, however, could produce troublesome results in cases where a foreign exporter sells to a related-party importer in the United States -- often a U.S. subsidiary of the same company. In such cases, the Department of Commerce normally must produce a "constructed export price" as the U.S. sales price, because there is no arms-length sale based on market prices. Under the proposed regulations, the level of trade is to be identified on an unadjusted basis in the foreign market, but the level of trade in the U.S. market is to be determined only after deducting all costs and profits that are normally deducted from the constructed export price. The result is that the level of trade for the U.S. sale will usually be deemed closer to the factory than the foreign market level, thereby entitling the foreign producer to either a level of trade adjustment in its favor or a deduction of foreign market indirect selling expenses. The effect is to reduce the calculated dumping margin, sometimes significantly. In short, by "constructing" the level of trade, the foreign producer will receive a level of trade adjustment when none is warranted or authorized by the statute.

3. Anticircumvention

In the Uruguay Round implementing legislation, the existing statutory provisions to prevent the circumvention of antidumping orders through establishment of a new final assembly plant in the United States or a third country where only minor assembly of the final product from its parts would be completed was amended. Under the new provision, the final assembled product would be within the scope of the antidumping order if (1) minor or insignificant assembly is done in the United States or a third country, and (2) the value of the parts imported into the United States or the third country from the country subject to the order is a significant proportion of the total value of the finished product.

In its proposed regulations, the Department of Commerce provides for determining the value of the parts imported by an affiliate of the exporter based on the production cost of the inputs. However, the use of production costs fails to capture the element of profit required to determine the value of the parts, thereby skewing comparison with market-based values for the finished products. Further, the proposed regulations are inconsistent in that while the use of production costs is discretionary when analyzing assembly in the United States, it is mandatory when analyzing assembly in a third country. When no market-based value for the imported parts is available, the Department of Commerce's regulations should require that the value of the imported parts be determined by constructed value -- which would ensure that profit is included in the calculation -- for both U.S. and third country assembly.

The Temporary Duty Suspension Act

The efforts over the last several years of the SIA, other interested private parties, USTR, the Department of Commerce and the Congress to maintain an effective antidumping law would be seriously undermined, however, if the Congress were to enact H.R. 2822, the Temporary Duty Suspension Act. This legislation would permit the Department of Commerce to temporarily suspend antidumping or countervailing duties for up to one year (with additional extensions available) if the Department of Commerce finds that "prevailing market conditions related to the availability of the product in the United States make imposition of such duties inappropriate." This finding is left entirely to the Department's discretion, with no statutorily defined factors for the Department to consider in its deliberations. While the bill does provide for an "opportunity

to comment," no other due process procedures are provided. Moreover, the bill does not provide for judicial review of any suspension decision.

While there has not been dumping by Japanese semiconductor producers since the mid-1980s, dumping in particular product segments could again recur. Permitting the Department of Commerce to suspend those duties, even temporarily, would only reward those who dumped while waiting for market conditions to improve, and compound the harm already done to the domestic industry. As explained below, the proposed suspension provision is unnecessary. There are existing mechanisms which may be used to limit or amend the scope of duty orders. Moreover, the proposed bill would undermine the remedial purpose of the law.

Temporary duty suspension would reward dumpers who have driven domestic producers from the market: As explained above, suspension of antidumping duties can indeed reward dumpers, particularly those who have succeeded in driving U.S. producers out of a particular market segment. Duty suspension may also prevent domestic industries from ever being able to produce the product which is alleged to be in short supply, by denying those industries the relief needed to invest in new plant and equipment in order to continue to compete. As the semiconductor industry's experience with FLASH chips demonstrate, relief from unfairly traded imports may be necessary for nascent domestic industries to grow or for new products to be developed. While proponents of the legislation argue that a temporary suspension would end as soon as domestic production begins, the very suspension could in fact prevent domestic production from ever developing.

Existing mechanisms are adequate: Mechanisms already exist under which the Department of Commerce can, and does, consider requests to adjust existing antidumping and countervailing duty orders based on allegations that a particular product is not available domestically. For example, the Department of Commerce recently approved a changed circumstances request based on the fact that the domestic industry did not produce the product at issue. *See Certain Cut-to-Length Carbon Steel Plate from Canada*, 61 Fed. Reg. 7471, 7472 (Dept. of Commerce 1996) (Final Notice and Partial Revocation of Antidumping Duty Order).

There are several such mechanisms currently available. First, the Department of Commerce can adjust the scope of an order during the course of an investigation; this often occurs when a previously-defined like product is not produced in the United States. Second, an existing order can be adjusted during a scope determination. Third, an interested party may petition for review of an order based on changed circumstances. Fourth, the International Trade Commission can exclude "niche" products as part of its injury determination. Unlike the proposed temporary duty suspension provision which would rely solely on the Department of Commerce's discretion, these procedures provide standards by which the decisions of the Department of Commerce or the International Trade Commission may be judged.

The bill would politicize the operation of U.S. trade laws: Under U.S. trade laws, antidumping and countervailing duties are imposed on unfairly traded imports in an amount equal to the level ("margin") of dumping or subsidy determined to exist by the Department of Commerce after a lengthy and thorough investigation, as well as a determination of material injury by the International Trade Commission. This system is designed to ensure that the trade laws act only as a remedy to offset the precise amount of unfair advantage provided to the unfairly traded imports. The discretion provided to the Department of Commerce and the International Trade Commission in making these determinations has been carefully circumscribed by the Congress over time to ensure that these determinations are made on the basis of the facts presented, consistent with the detailed statutory standards established by the Congress, rather than on political pressures. Both U.S. petitioning industries and foreign respondents also have extensive rights to appeal these determinations for review by a specialized federal court, the Court of International Trade.

H.R. 2822 would fundamentally alter the trade laws by granting broad discretion to the Department of Commerce regarding when antidumping and countervailing duties would be applied. The legislation establishes no standard regarding when prevailing market conditions make imposition of antidumping or countervailing duties inappropriate. At best, this makes the Department of Commerce the sole judge as to when market conditions justify providing relief to

a particular industry, with no system of checks and balances for ensuring that decisions are made on the basis of legitimate policy considerations.

Providing the Department of Commerce with discretionary authority to suspend duties interferes with the proper role of the International Trade Commission: Every antidumping or countervailing duty order is preceded by a determination by the International Trade Commission that unfairly traded imports are causing injury to the petitioning industry. In order to find injury, the Commission must first determine that subject imports compete with the domestic like product; where imports and domestic products do not compete, no injury is found. By permitting the Department of Commerce to suspend duties, the bill in effect permits the Department to overrule the Commission.

The bill's suspension mechanism would be subject to abuse: The suspension mechanism provides a readily available loophole for purchasers of unfairly traded imports which are actually substitutable for domestic products. Under the bill, all such a purchaser would have to do is narrowly tailor its specifications so as to exclude all products -- even those which are fungible -- but the unfairly traded import.

The bill is inconsistent with the purpose of the unfair trade laws: The purpose of the unfair trade laws is not to exclude imports. Rather, trade remedies are meant to curb unfair practices; the countervailing duty law, for example, is meant to offset foreign government subsidization. Similarly, and as reflected in the semiconductor industry's experience, the antidumping law provides a remedy to unfair pricing which often results from closed home markets or private anticompetitive practices. Granting even temporary exemptions for unfairly traded products undermines those goals.

Renewal of the U.S.-Japan Semiconductor Agreement

SIA also believes that the protection against dumping afforded by the antidumping provisions of the 1991 U.S.-Japan Semiconductor Agreement should be maintained in any new agreement negotiated with Japan as an insurance policy against renewed dumping.

These provisions simply require Japanese firms to monitor their own cost and price data internally, which encourages self-policing. If an antidumping investigation is launched, the Agreement also provides for a 14-day fast-track response by the Japanese producers in providing the necessary cost and price data previously collected. These two requirements have deterred dumping of semiconductors and will ensure that timely relief would be available to the U.S. industry if dumping were again to occur. This is critical in an industry such as semiconductors with short product life-cycles, where even a temporary halt in a production of a product can force a firm to exit that product sector permanently, as was the case for many U.S. firms engaged in the DRAM business in the mid-1980s.

Maintenance of this system seems particularly prudent when one compares the very small costs of maintaining a system of internal data collection and self-policing by Japanese firms with the potential costs to U.S. semiconductor producers and, potentially, semiconductor consumers, should the severe dumping of the 1980s recur in the near future.

Conclusion

The SIA welcomes this opportunity to present our views on the preceding issues relating to the U.S. antidumping law. This is a very important subject for the semiconductor industry, as the relief provided by this law was instrumental to maintaining the competitiveness of the U.S. industry during a very difficult period. The continued effectiveness of the law is critical from our perspective. Mr. Chairman, I would be pleased to answer any questions.

Chairman CRANE. Thank you, Mr. Boidock.
Mr. Grow.

STATEMENT OF ROBERT J. GROW, CHAIRMAN, AMERICAN IRON AND STEEL INSTITUTE; AND PRESIDENT AND CHIEF OPERATING OFFICER, GENEVA STEEL, VINEYARD, UTAH; ON BEHALF OF AMERICAN IRON AND STEEL INSTITUTE'S U.S. MEMBER COMPANIES

Mr. GROW. Thank you, Mr. Chairman. My name is Robert Grow. I am the president and chief operating officer at Geneva Steel, which is located in Utah. I am also the chairman of AISI, the American Iron and Steel Institute. AISI has approximately 50 companies today in Mexico, Canada, and the United States, producing about 70 percent of all of the steel made in North America. Today, however, I am representing only our U.S. members.

I came to this industry from another prior life in 1986, when I helped a group of Utahans purchase a steel plant that was being closed. In the early eighties, steel imports into the United States surged to over 30 percent. There were a number of major integrated steel plants in the West. Only one of those survived, and that is the one we purchased.

There were 48 large integrated plants in the United States and only 22 of those have survived to today, as a result of the predatory pricing and dumping that occurred during that period.

I would like to quickly reflect on some of the things I have learned, as I entered into a new industry. First, government ownership and control is alive and well in our industry. More than one-half of the world's industry is still government owned or controlled, although there is an effort toward privatization.

Second, government subsidies continue. EU, the European Union, subsidies alone over the last 12 years have been more than \$50 billion, which is enough to rebuild one-half of the American steel industry with brandnew plants.

Third, government involvement is alive and well in other ways. For example, the EU has put a quota on steelplates coming from all of Russia and the Ukraine of 100,000 tons a year. We are absorbing 100,000 tons a month being delivered here by trading companies out of Europe to divert it from their own market with the help of their government.

I was intrigued to listen to the preceding discussion because Micron recently announced a new plant in Utah. I am vice chairman of the State Economic Development Board. It was a \$1.5 billion plant that would have supplied 3,000 jobs, many of them high-paying jobs. That project, now half built, has stopped, and the day it stopped in Utah, the Malaysian Government offered to build the plant for free and provide it to Micron if they would move the facility to Malaysia. Government involvement in steel and other industries is alive and well.

Now, in 1992, we in the steel industry began to learn something else that is affecting international trade. The international steel cartels all of a sudden became apparent from investigations that were occurring. I have seen minutes of the meetings where the international steel companies have divided up the world market over the last 20 years. For example, the Japanese and Europeans

have agreed not to ship into each other's markets. The Koreans have likewise agreed not to ship into the European market. The Japanese have agreed with many other countries to limit their exports to their country in exchange for export limits into Japan. The result of that has been, whenever any major market in the world is weak, the excess capacity from those who have entered into the cartel agreements flows into the major open markets of the world, particularly the U.S. market. This has resulted in endemic dumping in our market for decades. I have seen the minutes of these meetings, which were quarterly, where the prices were fixed and world markets were allocated. If you want to hold a hearing on issues that affect open markets around the world, I would be glad to come back and talk about those issues.

We have been asking for 5 years in the Multilateral Steel Agreement talks for one simple provision which says governments will not tolerate the kinds of anticompetitive practices like price fixing and allocation of markets that close other markets and distort trade in both international and domestic markets.

What impact has this had on us? We have had the lowest steel prices in the world consistently for decades, while in areas like Japan, with protected markets, they have had huge subsidies, private subsidies flowing in of more than \$100 billion, which could have rebuilt their industry in a 10-year period.

I would be glad to answer questions later, but we are also particularly concerned about duty suspension. Duty suspension is exactly that. It affects the price; it doesn't affect the ability of products to come into this market. Any steel product made in the world can be sold here freely. What we are talking about is whether or not we reward those who have been involved in these kind of activities worldwide by giving them lower pricing in this market so they can continue to take market share, as they have in the past, rewarding their predatory pricing and activities in the past.

Thank you.

[The prepared statement follows:]

**Statement of
Robert J. Grow
President and Chief Operating Officer, Geneva Steel
and
Chairman, American Iron and Steel Institute**

**on behalf of
The American Iron and Steel Institute's
U.S. Member Companies**

**Regarding the U.S. Department of Commerce's Proposed
Antidumping Regulations
and the
Temporary Duty Suspension Act
April 23, 1996**

We appreciate the opportunity to testify on the proposed Department of Commerce (DOC) regulations implementing the antidumping provisions of the Uruguay Round Agreements Act (URAA) and H.R. 2822, the Temporary Duty Suspension Act. This statement sets out the views of U.S. members of the American Iron and Steel Institute (AISI).

Summary

H.R. 2822, the Temporary Duty Suspension Act, would give the DOC discretionary authority to suspend or reduce antidumping or countervailing duties on a specified product if the DOC determines that "prevailing market conditions related to availability of the product in the United States make imposition of such duties inappropriate." This legislation would reduce the effectiveness of U.S. trade laws, politicize their application and vest the DOC with inappropriate and unprecedented power to make arbitrary decisions undermining these laws. The DOC itself opposes the granting of this authority. While antidumping and countervailing duties may result in some consumer price increases in the short run, they produce more competitive markets that in the long term benefit all consumers. Availability issues can be addressed adequately under mechanisms provided for under current law. U.S. antidumping and countervailing duty laws exert pressure on foreign nations to open their markets and rely less on private cartels, subsidies and dumping to support uneconomic producers. H.R. 2822 would effectively eliminate the positive effects these laws have on creating more open world markets. We therefore urge the Subcommittee to reject the proposed legislation.

The U.S. members of AISI supported the Uruguay Round despite the fact that elements of the implementing legislation weakened the effectiveness of U.S. trade laws. The proposed DOC regulations implementing the URAA, while generally acceptable, contain certain provisions that could result in the further weakening of the effectiveness of U.S. antidumping law. We believe aspects of the proposed regulations should be revised to ensure that they do not add to the weakening of antidumping law that resulted from the URAA.

Background

The Domestic Steel Industry

Successful competition in today's global marketplace requires a vigorous manufacturing base. Steel is fundamental to that base. It is essential to manufacturing, infrastructure and defense -- the mainstays of every advanced economy.

In the United States, steel is a \$45 billion annual business, providing quality, high paying jobs for its 170,000 employees and supporting 500,000 retirees and their dependents. These jobs are vital to the economic health of America's heartland. In addition, steel-generated demand for key raw materials, such as coal, iron ore, and limestone, provides employment in a number of regions where other jobs are scarce. The steel industry is also a major consumer of computers and other high-tech equipment and makes extensive use of the nation's rail, trucking and shipping industries. As a result, steel is a

major contributor to the economy and to the tax base -- particularly that of states and local communities.

Today, the United States has a world class steel industry. The U.S. steel industry in the 1980s undertook a painful restructuring, investing \$35 billion in modernization -- more than the industry's total cash flow. The work force was cut by 57 percent from 1980 to 1992, and 450 facilities were closed. Reflecting this massive overhaul:

- The U.S. steel industry is now among the world's low cost producers for the U.S. market.
- U.S. labor productivity (man hours/ton) in the steel sector has attained world-leading levels.
- U.S. steel quality is second to none.
- The United States is emerging as a center of innovative steelmaking technology.

Foreign Unfair Steel Trade Practices

Because of the strategic importance of steel, governments around the world have sought to establish, nurture and protect their own steel production capacity. As a result, world trade in steel has been more distorted by government intervention than in any other manufacturing sector. These distortions, which have seriously damaged a highly competitive and strategically important U.S. industry, generally take two forms.

- **Dumping.** Private cartels and comprehensive import protection have restrained competition and diminished market pressure on foreign producers to cut back excess capacity -- giving rise to injurious dumping. Dumping occurs when producers practice price discrimination between markets, selling products at a higher price in their home market than in export markets or selling in export markets at below the cost of production. This is possible when imports into their own market and internal competition are restricted through private cartel arrangements (formally or informally sanctioned by government) and through direct government action.
- **Subsidies.** Foreign governments subsidize their steel producers directly and indirectly. Typical subsidies include equity infusions, soft loans, "restructuring" aid, debt relief, grants and below-market interest rates. Subsidization of foreign steelmakers is staggering, amounting to over \$100 billion between 1980 and 1992.

After exhaustive investigation and analysis, the U.S. Government has confirmed the enormity of unfair trade in the steel industry. In its 1993 investigation of foreign trade practices, the DOC and the U.S. International Trade Commission (ITC) found massive subsidies and pervasive dumping, and imposed weighted-average countervailing and antidumping duties of 37 percent on foreign steel products from 20 countries.

Despite these actions, trade-distorting practices continue. For example, in 1994 Spain announced a plan to give more than \$3.1 billion in debt relief and new equity capital to the parent company of two major Spanish steel producers. In 1995, the DOC, in its annual administrative reviews of antidumping orders, found that many foreign steel producers continued to dump their products in the U.S. market.

In many respects the continued phenomenon of dumping is a function of private cartels that are designed to stabilize prices by maintaining a constant state of slight shortage in their respective domestic markets. This is achieved by frequent meetings at which production and sales data are pooled and forecasts developed that function as production ceilings for a given time frame. The success of such arrangements depends, of course, on strict import restrictions -- otherwise, even a small unplanned increase in imports can cause prices to fall.

These collusive private agreements keep steel trade between European, Japanese and Korean mills to a minimum; impede highly competitive U.S. steel exports; and lead inevitably to pervasive dumping of foreign steel in the U.S. market. While foreign producers enjoy high prices and restrained competition at home, the U.S. market is subjected to price cutting that is not cost and efficiency-based. It simply reflects the ability of foreign producers to dump from behind a protected wall.

The Uruguay Round Agreements, while positive in some respects, do not eliminate dumping and the cartels that make it possible. They also do not prohibit harmful subsidies.

Our goals are to eliminate foreign government subsidies to steel, to open world steel markets, and to end foreign steel cartel practices such as price fixing and allocated markets. We hope to achieve these goals in a Multilateral Steel Agreement. If we do, and the Agreement works as intended, there may be less need to use trade laws in the future. But we have no illusions. We will need to maintain effective U.S. antidumping and countervailing duty laws.

U.S. Antidumping and Countervailing Duty Laws

Under U.S. trade laws, antidumping and countervailing duties may be imposed on unfairly traded imports in an amount equal to the level ("margin") of dumping or subsidy determined to exist by the DOC after a lengthy and thorough investigation. This process includes extensive opportunities for foreign producers to submit detailed information in response to complaints and findings. Duties are only imposed, however, if the ITC also determines -- after an independent investigation which provides further opportunities for foreign producers to present their arguments -- that material injury has occurred. This system is designed to ensure that the trade laws offset only the precise amount of unfair advantage provided to dumped or subsidized imports.

The discretion provided to the DOC and the ITC in making these determinations has been carefully circumscribed by Congress over time. This limited discretion helps ensure that decisions are insulated from political pressures and are made on the basis of the facts, consistent with the detailed statutory standards established by the Congress. Both petitioning U.S. industries and foreign respondents also have the right to appeal DOC and ITC determinations to the U.S. Court of International Trade.

The fair and consistent application of these laws against unfair trade is critical to U.S. steel producers who must compete in a market characterized by pervasive foreign subsidies and dumping.

The Temporary Duty Suspension Act

H.R. 2822 would result in a serious weakening of U.S. trade laws by granting the DOC broad authority to reduce or remove at its discretion antidumping and countervailing duties previously imposed on imported products. Specifically:

- The DOC would have the authority to suspend or reduce antidumping or countervailing duties any time the DOC finds that "prevailing market conditions related to the availability of the product in the United States make imposition of such duties inappropriate." There are no criteria in the bill that define the market conditions that would warrant such a conclusion. Moreover, no provision is made for judicial review.
- Because the legislation would allow the DOC to reduce as well as suspend duties, the DOC could set a duty at a level less than the margin of dumping or subsidy previously established through statutory methodologies.
- The bill allows for an initial duty suspension of one year, but the suspension may be extended indefinitely through successive one-year periods.
- Duties, once suspended, may be reimposed only if the DOC finds there is "insufficient basis for continuing the suspension."

Similar proposals were rejected when the Uruguay Round implementing legislation was considered in the last Congress. The House Committee on Ways and Means and the Senate Committee on Finance rejected in bipartisan votes these short supply proposals, which were also opposed by the Administration.

H.R. 2822 would give the DOC broad license -- but little guidance -- to overrule its own and ITC rulings on unfair trade practices. A temporary duty suspension provision should be rejected for five major reasons: (1) It would conflict with the purpose and intent of U.S. trade laws and reduce their effectiveness. (2) It would hurt consumers in the long run. (3) It would create significant political and administrative problems. (4) It is modeled on irrelevant precedents. (5) It is unnecessary.

1. A temporary duty suspension provision would reduce the effectiveness of U.S. trade laws.

The ostensible purpose of H.R. 2822 and other duty suspension proposals is to alleviate so-called "short supply" situations -- i.e., situations in which a product is not currently available from a U.S. producer. The argument for such measures, however, is based on a fundamental misunderstanding of how antidumping and countervailing duty orders work.

A key purpose of the trade laws is to help achieve open and fair competition in the U.S. market. As a remedy against foreign unfair trade practices, the amount of the dumping or subsidy provided to the subject imports is offset at the time of importation by an equivalent duty. This imposition of a duty ensures that an affected import is priced fairly. An antidumping or countervailing duty order, however, does not render a product unavailable in the domestic market. It is not a quota or voluntary restraint arrangement (VRA) which limits the amount of a product that can enter this country. Rather, an antidumping or countervailing duty order only requires that the imported merchandise be sold at a fair price.

The practical effect of a duty suspension mechanism would be to create a right to obtain imported goods at prices that are less than fair value. Such prices result from dumping and subsidies, not competitive market forces. The fact that the bill provides for reducing duties as a means to increase availability shows that price, not supply, is the issue that concerns supporters of the legislation.

When unfair trade practices are permitted to keep prices artificially low, U.S. industry is unable to raise the capital to re-invest and again manufacture the products involved. A suspension of duties even on a temporary basis would simply perpetuate a situation in which potential U.S. producers would be unable to earn a sufficient return on capital to re-enter the market.

Thus, H.R. 2822 would reward those foreign companies that have driven U.S. products out of the market through dumping or subsidies by denying U.S. companies the ability to invest in new plant and equipment. This would be particularly harmful to U.S. steel companies and workers and is at odds with the very purpose of our trade laws.

2. Consumers will lose in the long run.

• Reduced Competition and Job Loss

When foreign dumping and subsidies drive U.S. producers from the market and reduce competition, consumers, including downstream manufacturers, lose in the long run. In the words of Jeffrey E. Garten, former Under Secretary of Commerce for International Trade:

In the short run, the consumer may have to pay higher prices for individual goods. . . . However, without antidumping enforcement, in the long run the consumer will ultimately be the one to pay as reduced competition enables foreign producers to raise prices. Moreover, the consumers as citizens will also pay in terms of high unemployment as well. In the long run, the consumer will ultimately benefit as increased supply by domestic producers ensures a stable and competitive market place, in which industrial users are not forced to rely only on off-shore sources for components which may very well be controlled by their direct competitors.

Proponents of a temporary duty suspension provision argue that it is only intended to help users of products subject to duties to remain competitive in the world market. There is no way, however, to remove or reduce duties without encouraging foreign producers to continue the same practices that led to the original imposition of duties.

- **Duties Do Not Affect Economic Growth**

Supporters of duty suspension legislation have also argued that the imposition of antidumping and/or countervailing duties on unfairly traded imports has somehow materially decreased or slowed supply and threatened U.S. economic growth. With respect to steel in particular, such allegations are without foundation. First, these arguments ignore the fact that imposition of duties does not establish an import quota or embargo or otherwise restrict importation. Imports found to be unfairly traded may continue to enter the country in unlimited volumes. The additional duty they bear merely offsets the degree of dumping or subsidization.

Second, steel is relatively price inelastic. This means that modest price increases have little effect on the volume of steel consumed. Demand for goods containing steel -- autos, appliances, building materials -- is determined by overall income growth in the economy and not by modest price changes for steel products. The suggestion by some that price increases in 1994, returning steel companies to profitability after two years of losses, threatened to choke off the U.S. economic expansion is inconsistent with economic reality.

Third, supporters also contend that lead times for obtaining steel lengthened and that customers were put on allocation in 1994 as a result of the antidumping and countervailing duties imposed in 1993. In fact, there is no evidence that duties had a significant role. In 1994, the U.S. economy was growing rapidly, increasing demand for all goods, and market conditions tightened. To assure their steel supplies, some customers placed orders with more than one producer which, in turn, led producers to allocate their output. At the same time, international steel markets were also tight and world steel prices rose -- much more, in fact, than prices in the United States. If U.S. duties had been the culprit, we should have seen U.S. prices rise faster.

3. **A temporary duty suspension provision would create significant political and administrative problems in the application of U.S. trade laws.**

- **Politicizing U.S. Trade Laws**

The proposed legislation provides no standards, guidelines or criteria for determining when prevailing market conditions make imposition of antidumping or countervailing duties "inappropriate." Moreover, the legislation does not provide for judicial review. The burden of making such decisions would fall solely on the DOC with no recourse to the judicial process to ensure that decisions are fair and equitable. In addition, the lack of clear statutory standards would encourage the intrusion of politics into a process designed to be open and facts-driven. The DOC, as well as other agencies, would be the object of political pleadings by foreign and domestic producers.

The U.S. trade laws provide objective standards for determining the presence of dumping or subsidies; any effects these practices have had on prices; and, whether such practices have resulted in injury to a U.S. industry. The process by which these determinations are made is open and transparent to all parties involved. A temporary duty suspension provision with no statutory criteria for its use would cloud this process and lead to the arbitrary application of U.S. trade laws.

The uncertainties created by a temporary duty suspension provision could act as a trade law barrier to U.S. producers who have suffered injury by unfair trade practices. It could discourage them from seeking relief under trade laws. Seeking relief requires a significant commitment of time and resources with no assurance that the DOC or the ITC will issue a determination favorable to the petitioner. By introducing the possibility that a decision could be reversed on political grounds -- after unfair trade practices had been proven -- a temporary duty suspension provision would act as a deterrent to smaller, emerging industries which otherwise might pursue the remedies provided by trade laws.

In addition, the discretionary authority provided under a temporary duty suspension provision would allow the DOC to pursue a national industrial policy by granting duty suspensions to industries that an Administration regards as important to the economy. The Congress should not give the executive branch the option of using the trade laws to create "winners" and "losers" according to its vision of industrial policy.

- **Conflict with the Role of the ITC**

Under U.S. trade laws, the ITC must find whether dumped or subsidized imports are causing or threatening to cause injury to a petitioning industry. To find injury, the ITC must determine that U.S. industries compete or will compete with the imported products. The injury analysis is rigorous and it is not uncommon for U.S. producers to be denied relief by the ITC even after they have received high antidumping and countervailing duty margins from the DOC. A temporary duty suspension provision would give the DOC authority to override the ITC and suspend duties on products found by the ITC to compete with domestic goods. A temporary duty suspension provision would also result in the DOC's wasteful duplication of the ITC's analysis of U.S. market conditions.

- **Potential for Abuse**

Proponents of a temporary duty suspension provision maintain that the provision would be used only in situations where U.S. companies require products with unique specifications that no U.S. products meet. It is important to note that no such limitation is set forth in the legislation. Congress should be aware that there have been steel cases of alleged "no domestic supply" where U.S. producers are in fact able to supply the product. Our concern is that this provision would create an incentive for purchasers and producers of dumped or subsidized goods to develop specifications so narrow that only the dumped or subsidized goods could meet them. As a result, the DOC bureaucracy would be required to determine such questions as whether adequate substitutes exist for the products at issue in terms of their performance, price and quality. This would involve the DOC in business decisions best left to the private sector.

4. Other provisions in U.S. and European law are not relevant models for a temporary duty suspension.

- **Comparison to VRA Short Supply Not Appropriate**

Proponents of temporary duty suspension frequently point to the short supply mechanism under the now defunct steel VRAs to suggest that product-specific suspension of antidumping or countervailing duties is appropriate and administratively feasible. In fact, comparisons to the VRA model are misleading. First, under the VRAs, the volume of imports of particular steel products was limited. As noted above, the imposition of antidumping or countervailing duties does not limit the quantity of imports. Second, the VRA short supply mechanism applied only to a relatively narrow and quite homogeneous group of products. Because the steel products involved in the VRAs were so similar, the analysis of product characteristics, producers, market conditions, and the like was relatively straightforward. The proposed temporary duty suspension provision, however, would apply to any product affected by antidumping or countervailing duties, products ranging from agricultural commodities to chemicals to industrial machinery to consumer electronics. Developing and maintaining the expertise to analyze properly the relevant factors for such a breadth of industries, products and markets would be a costly, perhaps impossible task. A large volume of such requests could inundate and overwhelm the DOC, creating gridlock for both duty suspension requests as well as antidumping and countervailing duty investigations.

- **Comparison to European Union Temporary Duty Suspension Provision Not Appropriate**

Proponents of H.R. 2822 also point to the fact that the European Union (EU) adopted a temporary duty suspension provision in December 1994 and that only one suspension request has been granted since the provision took effect. However, there is no valid basis for comparison with H.R. 2822 because of the vast fundamental differences in the nature of the European and U.S. trade law systems. First, EU antidumping law has, for several years, included a provision that allows the EU Commission either to

revoke or not impose antidumping or countervailing duties if it can "clearly conclude that it is not in the Community interest to apply such measures." The EU temporary duty suspension provision is merely an extension of this provision, providing for **temporary** as opposed to **permanent** duty suspension. Nowhere in either EU provision is the issue of availability identified as a consideration for duty suspension. Since the EU is a union of sovereign states, ample discretion, as provided for in the "Community interest" provision, is necessary to determine if the imposition of duties would benefit all member states. Moreover, in the one instance in which the Commission actually granted a temporary duty suspension, availability was not an issue.

Second, the EU provision specifies that duties may be suspended where market conditions have temporarily changed "to an extent where injury would be unlikely to resume as a result of the suspension." H.R. 2822 does not provide for an injury test, and grants the DOC unilateral discretion to determine when prevailing market conditions related to the availability of the product make duties inappropriate. The ITC, which has responsibility for determining injury under U.S. trade law, would have no role.

Third, under the EU system, once antidumping duties have been assessed, it is extremely difficult to adjust them upward or downward. In the United States, the administrative review process adjusts duties to take into consideration changing market conditions or the fact that the foreign exporter has ceased dumping. The EU, on the other hand, seldom grants annual review requests and, thus, duties are rarely adjusted.

Finally, the EU system is much more informal and provides far less administrative and judicial review. In the United States, the DOC and ITC are required to follow detailed statutory and regulatory guidelines in an open, transparent process that is designed to be insulated from political pressures. The EU Commission, however, is given broad discretion to impose duties that are equal to or less than the amount of dumping or subsidy found and deemed to be in the best interest of the EU member states. As a result, the EU process is less transparent and more vulnerable to political influence than the process under U.S. law. Therefore, a purely discretionary measure, such as H.R. 2822, is entirely inconsistent with the U.S. system which is open and rules-based.

5. Adequate procedures exist for addressing availability issues.

Existing law provides four mechanisms to deal with any real instances of no domestic supply:

- First, the DOC can define and clarify the scope of an antidumping or countervailing duty proceeding during the investigation phase. This enables the DOC to exclude from coverage of any order products that are not relevant to the purpose of the petition.
- Second, the ITC can find "niche" products and exclude them from an injury finding. Any product not subject to an affirmative injury finding cannot be subject to duties.
- Third, once an antidumping or countervailing duty order is in effect, the DOC has the authority to clarify the scope of the order to exclude imported products that are not addressed or intended to be addressed in the order.
- Fourth, the DOC and ITC both have the ability to undertake a "changed circumstances" review and revoke all or part of an order.

The most frequently used mechanism is clarifying the scope of an order. Where there is no U.S. production of a product that can compete with the imported good subject to an antidumping or countervailing duty order, or no industry interest in producing the product, the order may be amended to exclude that product. From October 1993 to December 1995, the DOC investigated requests to exclude 135 products from the scope of antidumping or countervailing duty orders. Of these, the DOC found that 106 were not subject to duties. (These figures do not include exclusions from scope made in the course of the original investigation.)

The steel industry supported such adjustments willingly both in the 1993 investigations and after the determinations were made. For example, the DOC recently exercised its authority to exclude products

from the scope of antidumping duty cases. Canadian producers requested that the DOC conduct a "changed circumstances" review to determine that a particular kind of cobalt-free plate be exempt from antidumping duties. The domestic industry did not oppose excluding the product from antidumping duties and no such duties will be imposed on this product.

Finally, it should be noted that any availability problems related to the imposition of duties can be cured automatically through the administrative review process. Under this process, if the dumping or subsidy that prompted the original duty is found to have stopped, then the duty is removed.

If there is concern that these mechanisms are insufficiently responsive or work too slowly, then consideration should be given to ways of streamlining the administrative process. AISI's U.S. member companies support expediting the DOC's scope and "changed circumstances" rulings. If the process could be further streamlined -- without harming U.S. trade law enforcement -- this, too, would have our support.

There is no reason, however, to add another bureaucratic process to the existing ones. Although a duty suspension would be called "temporary," as opposed to the current processes that result in permanent changes in scope, this would not alter its effect on the injured industry. So long as dumped or subsidized products can be imported at artificially low prices, domestic producers will have no incentive to enter or remain in the market. In fact, as drafted the proposed legislation gives preference to continuing a "temporary" suspension, once granted. The only basis for reimposing duties would be a finding by the DOC that there is "insufficient basis for continuing the suspension."

Conclusion

The United States' trade laws have been carefully structured to promote free and open markets linked by vigorous and fair trade. The process by which these laws are administered is among the most objective and transparent in the world. All parties are afforded access and the opportunity to present their views, and the resulting determinations are based on clear, impartial standards. H.R. 2822 would amount to a "Trade Law Suspension Act" and should be rejected. It would undermine the principles and processes of current trade laws by introducing political pressure, subjectivity and unpredictability and would reduce our capacity to foster open markets. It would discourage new capital investment; limit the ability of U.S. producers to restructure to meet the changing demands of the marketplace; and reward foreign producers who have been proven to engage in continuing unfair trade practices that are injuring U.S. industry. Any legitimate availability issues can be addressed through existing mechanisms under current law.

The Department of Commerce Proposed Antidumping Regulations

In order to conform with our revised international obligations under the WTO Antidumping Agreement, the URAA made extensive changes to U.S. trade laws, including those which have increased significantly the costs to petitioning domestic industries to participate in antidumping proceedings. The regulations proposed by the DOC to implement the URAA antidumping provisions represent a constructive first step in the regulatory process. They are faithful to the WTO Antidumping Agreement and consistent with the URAA. They seek to achieve an appropriate balance between investigative rigor and the costs of participation on the parties. The DOC has maintained, and in some instances enhanced, the overall transparency of the process. The proposed regulations contain improvements to certain administrative procedures. For example, the proposed regulations would permit business proprietary data to be discussed at hearings, making them a more useful forum for examining information and issues. The DOC also is to be commended for proposing to permit counsel for domestic interested parties to retain, and discuss in successive administrative reviews, a respondent's business proprietary information obtained under administrative protective order. This latter change would redress a long-standing imbalance in access to information that has favored foreign respondents and would, for the first time, permit counsel for domestic interested parties to monitor the consistency of a respondent's submitted information from year to year.

However, certain provisions have the potential for excessive, self-imposed restraints on the DOC's investigative reach and fail to distinguish properly between foreign respondents that are forthcoming with information as opposed to those that selectively withhold information. The DOC's role is to assess accurately and fairly whether dumping is occurring and, if so, the amount of the dumping. These regulations should not weaken the DOC's ability to ensure that it obtains the information it needs to carry out the intent of U.S. trade laws.

Among the most important issues of concern is that of "level of trade." This phrase encompasses a number of elements critical to the DOC's calculations: identification of proper comparisons, the adjustment for differences in levels of trade, and whether the so-called "level of trade offset" adjustment will be made. The proposed regulations substantially change the DOC's practice with respect to level of trade issues, often in ways unduly favorable to respondents and clearly not contemplated by Congress. Unless the DOC obtains all necessary information from the foreign respondent companies and unless the DOC takes measures to prevent manipulation, this complex area of the law could be used to evade the imposition of antidumping duties. Some additional areas of priority concern are described below.

- **Date of Sale**

Identification of the proper date of sale is critical to the integrity of the antidumping analysis because that date determines which U.S. and home market sales are compared and, therefore, the margin of dumping. The DOC's longstanding practice has been to use the date on which the material terms of sale are agreed as the date of sale, a practice consistent with the WTO Antidumping Agreement.

In its proposed regulations, however, the DOC has stated that it intends to abandon its practice for a "bright line" rule and will "ordinarily" use invoice date as the date of sale. The DOC's use of the term "ordinarily" will, in practical effect, be administered as "except in the most rare of circumstances." This strong presumption and foreign respondents' complete control over when invoices are issued offers respondents an effective and low-risk means of skewing or masking dumping margins. A difference of a matter of days may significantly alter the sales compared and the margins calculated.

Accordingly, the DOC should not change its current, longstanding practice regarding identification of the date of sale in the face of this potential for manipulation. If the DOC believes that it must create a different general rule, date of shipment is far preferable to date of invoice because respondent has much less ability to manipulate when products are shipped to the customer. Date of shipment would be readily verifiable while avoiding the potential for manipulation inherent in date of invoice.

- **Market Viability Determination**

In the process of determining whether dumping has occurred, the DOC must decide whether to compare a foreign producer's U.S. sales to the producer's home market sales or to the producer's sales in a third country market. Under prior law, this decision was based solely on whether the home market had a sufficient number of sales of the merchandise to assure that the prices were representative of the foreign company's sales practices. The new law provides for using a producer's third country sales as the comparison market when the producer's home market, although sufficiently large, may "not permit a proper comparison" because of a "particular market situation." Examples of such "particular market situations" that may prevent an accurate measurement of the amount of dumping include government control of prices and substantial seasonal variations in demand. In these cases, the U.S. industry is permitted to provide evidence that the foreign producer's home market should not be used for price comparisons.

In the preamble to the proposed regulations, however, the DOC indicates that it will establish an extraordinarily high burden of proof for U.S. industries that propose using a third country market for comparisons. The proposed regulations would also establish a deadline for presenting evidence so early in the process that the foreign producer may not even have submitted to the DOC a response to the original dumping allegations. The twin burdens of proof and deadline would effectively preclude such allegations from being made or accepted. The DOC should establish a burden of proof similar to that used to evaluate other types of allegations during the course of antidumping proceedings and the

deadline should be revised to permit both a realistic appraisal of the data and preparation of a well-documented allegation.

• **Disclosure of Information and Sufficiency of Information**

The DOC and the courts have long recognized that the respondents cannot be permitted to control the antidumping inquiry simply by virtue of the information they choose to withhold or disclose. However, the proposed regulations do not adequately define the obligations of respondents to disclose relevant information in antidumping proceedings. Therefore, the regulations should be revised to:

- specify that the DOC will, as permitted by the statute, normally use an adverse inference whenever an interested party fails to cooperate by not acting "to the best of its ability";
- clarify that the "best of its ability" standard is strict and does not permit a respondent to maintain less accurate records during later periods of the review process than it did during the original investigation; and
- establish that respondents, as the party controlling access to the relevant information, have the burden of demonstrating that they are entitled to any beneficial price adjustments or other decisions that are favorable to them.

Issues Raised by Steel Importers

Steel importers have raised certain objections to the proposed regulations. For example, they object to the failure to include a short supply provision in the proposed regulations. There is no statutory authority, however, for the DOC to authorize by regulation the suspension of duties on the basis of product availability. This issue was thoroughly examined and rejected by this Committee during the consideration of the URAA. Accordingly, contrary to the suggestion of steel importers, the DOC cannot circumvent the legislative process through promulgation of regulations. Steel importers also contend that the proposed regulations improperly permit the DOC to deduct absorbed or reimbursed countervailing duties from the price in the United States. Contrary to this contention, the WTO Antidumping Agreement and the URAA provide for deduction of import duties. In addition, countervailing duties absorbed or reimbursed by the seller are a direct sales expense that must be accounted for if an "apples-to-apples" price comparison is to be made. We concur with steel importers' concerns that the proposed regulations should clarify rules for automatic duty assessment and codify the current arm's-length test as a prerequisite to using prices of sales to affiliated parties in the home market to measure normal value. At the same time, however, the DOC should be receptive to evidence indicating that sales to unaffiliated parties have been manipulated by foreign respondents to achieve their desired results.

Conclusion

The drafting of the regulations to implement the URAA is the final phase in a process which began with the opening of the Uruguay Round in 1986. How these regulations are written can be dispositive of whether and to what extent antidumping and countervailing duties are applied to dumped and subsidized imports. The DOC should take this opportunity to preserve the strength of U.S. trade law and ensure that domestic producers are afforded adequate access to trade law remedies.

Chairman CRANE. Thank you, Mr. Grow. Let me again throw some questions out to the entire panel. Let's first deal with H.R. 2822. You folks paint a convincing picture that antidumping relief has helped your industries, and I am not seeking to take that relief away, but to explore relief for other U.S. companies if it doesn't injure your industry. If your customer cannot obtain a product domestically and is forced to pay high duties for the imported product and then either goes out of business or moves overseas, haven't you lost a customer? If that producer is able to obtain the product in the United States and if the customer stays in the United States, wouldn't that send you a signal you should produce the product and guarantee you will have a customer here if you decide to produce that product?

Does anyone care to respond?

Yes, Mr. Grow.

Mr. GROW. I would like to first. I appreciated Bill Hickey's list of products the SSCI is gathering from its survey. The American Iron and Steel Institute sent the head of the SSCI a request that they perform this survey so we could look at the list of products that they were uncertain could be produced in the United States or were being produced. In the 2 hours since we have had this list today, we have found producers for 6 of the 25 products listed here, and I think, given a little more time, we could provide producers for most of these products.

So the answer to your question is, We want healthy customers. The people that Bill Hickey represents happen to be 80 percent of my customer base at Geneva Steel, the service centers, and what we need is better information in advance, and that is why we requested them to perform the survey so we could demonstrate that products are, in fact, being made in the United States with a newly renovated and stronger steel industry, which has been growing here in the United States.

To repeat, we want healthy customers. We do not want to keep our customers from producing and providing the goods and services they want to. But we, also, believe there are some—politely—some games being played as to what products are available in the United States or can be produced in the United States, and we would like the opportunity to continue to respond to these lists as they are put forth.

Three of the ones listed here came forward in a prior hearing and LTV within 1 week announced they could produce those products, and two-thirds more of them have been checked on the phone today while we have been waiting to testify.

Chairman CRANE. Very good.

Mr. Boidock.

Mr. BOIDOCK. Mr. Chairman, we, too, want healthy customers and, to that end, we have been working for years with our customers to try to fashion some effective supply provision for this law to no avail. We cannot do it. I submit that, if the semiconductor producers were permitted to go out of business or went out of business in the eighties or went out of business today, that would be worse for our customers than having the situation that exists today.

We have worked very hard to find a resolution, but we have been unsuccessful.

Mr. REGAN. Mr. Chairman, we have never faced a situation where a customer has not been able to get a product because of a dumping duty. They can get it. They might have to pay a little bit more for it, but they can always get it. So we have never really faced a situation where we would lose a customer. It has never been a problem.

Mr. GROW. We have had a couple instances in the steel industry where there are products that are not produced in the United States and producers do not want to produce them. For example, cobalt free steel, nuclear free steel and cobalt plate, where we have consented in the procedure for changed circumstances. I believe that procedure needs to be streamlined. Give our industry 30 days to find out if we can produce it or want to produce it, 30 days for a decision to be made, and I think that would solve most of the problems. I talked with Bill Hickey about that as a potential solution, which would expedite our customers getting what they need and, at the same time, give us the opportunity to produce it if we can.

Chairman CRANE. In what ways could we amend H.R. 2822 to assure the authority is not abused and covers only situations in which the product is truly not available from U.S. producers?

Mr. REGAN. Mr. Chairman, I think the better focus might be to try to work with the Commerce Department on this whole question of changed circumstances and work with the ITC. We have been through situations where allegations have been made, and it is a fairly intensive process to try to go out there and really ferret out the facts because the government, ultimately, has the burden of doing that. There are lots of allegations made on both sides, and we found the changed circumstances prove to be a fair and reasonable process for determining whether, in fact, a product is truly available in the United States, whether a product that someone wants to import does, in fact, compete against a product which is covered by a dumping order.

So I think, perhaps, the approach I would recommend you take is to work with the Assistant Secretary, who I think indicated this morning, that she is willing to work with you to try to make that changed circumstances process work better for you in terms of timeliness.

Chairman CRANE. Well, ideally, I would like to get some of you folks in business that have more hands-on experience in this area on both sides of that debate to sit down in a congenial environment and listen to the expertise coming from the business community, rather than depending primarily on government analysis and input. So, hopefully, we might be able to set something like that up a little later. We do appreciate your input.

One final question on that bill. Can you say with confidence all products and product specifications within the scope of a particular order are made in the United States?

Mr. REGAN. Well, I can say because we faced it, situations where people have challenged that, and we have had to go back and take a hard look at it, and we have had the process of going through the procedures to make sure that that is the case. So I would say,

in our particular area, I can't speak for the other gentlemen, but in our particular area, we feel very confident the scope of the determination does include products made in the United States or products that compete directly with a product which is covered by a dumping order.

Mr. BODDOCK. That was certainly true in the case of DRAMs in the eighties. We made all of the products that were the scope of the dumping order. And I might add that, as a result of the anti-dumping law and a lot of other things like intellectual property protection and investment in R&D, our industry has bounced back to the point where now we are the largest—the United States has the largest semiconductor industry in the world.

My company, for instance, is investing \$2.6 billion in Dallas, Texas, not overseas, right now.

Mr. GROW. Over the last few years, I have had a chance to visit steel plants in more than 20 countries. Steel making is not unique around the world. We all have very similar processes. The American steel industry has plants that can produce the full range of products. In addition, it has about 20 million tons of new capacity coming back online as it has been recovering from the events of the eighties and early nineties. And, as a result, I believe almost anything that is steel can be produced in the United States with the kind of quality that would match steel produced anywhere else.

And so I think one thing this hearing is doing, and this question that you have raised is doing, is it is causing customers, companies, and producers to talk to each other about the products they are currently buying overseas. In other words, this list, which the SSCI just provided us, is a list of the products they are buying overseas today, and what it is doing is giving us an opportunity to look at that list and say, "Gee, we can make that, too." In fact, I think I can roll one of these myself. The first one on the list, 10 gauge 84 wide, because I have a unique rolling mill that is that wide. And so I would be very surprised if there are hardly any products we can't make and wouldn't want to make if we can get a reasonable return on them. There are 5 million tons of steel capacity in the United States this year not being used that was used last year because the market is weaker. Every additional ton we make adds to our bottom line. We are in business to make and sell steel. Name the product, we will try.

Chairman CRANE. Turning to Commerce's proposed regulations, as to their proposal to deduct certain countervailing duties in a dumping case, is the rationale for deducting reimbursed duties different in a dumping case from a subsidies case and why or why not?

Mr. REGAN. That issue of duty absorption is an issue we all had plenty of time to debate back in 1994. I am not intimately familiar with the specific portion of the regulations you speak to. I just had a quick chance to take a look at them when they were mentioned earlier. But it appears to me the Commerce Department in these regulations has limited the deduction to countervailing duty situations.

Chairman CRANE. Does anybody else have a view on it?

Mr. GROW. The question you raise is an interesting one. I hadn't thought about the distinction between the two. I think the concept

of dumping, as I understand it, is that we are looking at a foreign producer and saying they make a certain profit in their own market. Are they willing to trash our market and make a lower profit and drive our pricing down predatorially? And, therefore, you are really looking at the return at the plant overseas, and that requires deducting all of the costs of taking it from that plant to our market, and that includes the duty, and so I see the logic of deducting it perhaps in both cases, as opposed to just the countervailing duty case.

Chairman CRANE. I am concerned the proposal may violate the subsidies agreement in the antidumping agreement because it requires the subsidies margins be paid twice in certain circumstances. Any views?

Mr. GROW. I don't think it requires it to be paid twice. I think it is being used in determining the pricing, the pricing for the dumping and subsidy of the dumping test. Maybe I am not understanding that correctly.

Mr. REGAN. Mr. Chairman, during the debate in 1994, this issue was discussed at great length, and I think the prevailing view was that this notion of making adjustments for duty absorption was, in fact, being done in other countries and is, in fact, authorized under the agreement.

Chairman CRANE. Before I yield, Mr. Regan, let me ask you a question. I notice you are in Corning, New York. Do you use Corning Glass in any of your products?

Mr. REGAN. I own some Corning Glass in my cupboard I must admit.

Chairman CRANE. Well, then, before I yield to Mr. Houghton, there may be a conflict of interest if he asks you any questions.

Mr. Houghton.

Mr. HOUGHTON. I will not ask Mr. Regan any questions, but the question is, Do you have any Crane products in your house? [Laughter.]

Seriously, Mr. Chairman, thank you very much. I will only ask one question. You know we have been talking about this bill, H.R. 2822, and there are differing opinions on this thing, but let me ask you gentlemen a question. Suppose H.R. 2822 had been in effect for the past 10 years, what impact would that have had on your business?

Mr. REGAN. Well, in our case, I think we would have spent a lot more money on lawyers. As you know, this industry has gone through a very difficult 25 years. We have fought back against the competition, have spent millions and millions of dollars on these cases. Our first case goes back to 1971. The numbers of reviews we are going through at any one point in time count in the tens. That is how many. So we are constantly paying lawyers.

To be honest with you, to open up the floodgates to another set of charges of short supply is something that frightens the daylights out of us.

It should be remembered that the dumping law was significantly changed in 1994. So we face the prospect by the year 2000 of having our cases, essentially, sunset. So there was a significant change, which weakened the statute. Our perception at the time was that that change would mitigate some of the circumstances

that some of these other industries face downstream. But, like I said, it hasn't been a problem for our industry. So it is hard for us to really offer some specific advice on it.

Mr. GROW. I think we would have spent a lot more time paying lawyers and a lot more time involved with the Department of Commerce. This question of what is a product is really important to us because at a plant like Geneva we can make thousands of chemistries of steel in an infinite number of shapes and sizes and so can the others.

If you went out today to 10 bakeries and bought a chocolate cake, the recipe in every one would be different, I suspect, but it would still taste like a chocolate cake to you. To many of our customers, there is a game we call the specs game. You can design specifications that the producer doesn't currently make. The only way you make money in the steel industry is if you can batch the specifications from one customer with the specifications from another so you can make full-size batches. We make 250-ton batches at Geneva. Anything less than that, we throw the rest away. And so I think we would have spent a lot of time chasing this issue of what is a product.

Now, one interesting piece of testimony, to me, earlier today was the Enron testimony because we are a plate producer, and they raised the question in their specification—they ultrasonically test the plate. The answer, from my perspective, is that is not done in the United States because what we do in the United States is we ultrasonically test the pipe product. So is it appropriate that he can put in a specification that says you must test the plate and then test the pipe ultrasonically?

And so this game of what is a product would have involved a tremendous amount of time and energy. Now, in the antidumping and countervailing duty cases, people are already experienced with those products. Lots of questions are raised about how do you categorize products? which ones are correctly put together? which ones do we exclude? And so the same people who dealt with those issues there also deal with the changed circumstances, and that gives us a more appropriate forum to deal with the problem. But it would have been expensive and time consuming, and I would just point out the steel industry has only made money, net profits, in like 2 or 3 of the last 10 years. We don't have money to waste or time to spend doing things that aren't essential.

Mr. BOIDOCK. Congressman Houghton, unequivocally, if we did not have antidumping laws, we would not have a DRAM industry in this country now. When you start to hack away or however small it may appear, and it isn't small in this case, on the effectiveness of those laws, you put at risk industries like ours or at least permit circumstances to develop like those that existed in the mideighties. I am not blessed with wonderful 100 percent hindsight, but I don't think there is any doubt about it. We would not have a DRAM business in this country if we didn't have antidumping laws.

Mr. HOUGHTON. Mr. Liles, have you any comment?

Mr. LILES. Well, Tim has spoken on the issue. I think without the dumping laws, what we really see in a lot of the industries is lost opportunities of future products. Also, if we can't protect the

existing market now, the future markets will also be lost. And that is something that, in a static analysis that you get from the ITC, you don't see. Also, the other effectiveness of our dumping laws is not really seen. In that television production being moved to other countries by the very same multinationals that the dumping laws were impacting, by moving to another country, they have essentially circumvented the dumping duties that we have, and it still places our industry at a disadvantage, and therefore the cost of receivers is still pretty cheap here in this country.

Mr. HOUGHTON. Mr. Hancock.

Mr. HANCOCK. Mr. Grow, you evidently have been looking the world over on the supply of steel. Do you have any idea how much of the world steel production capacity is actually owned by governments that we are competing with?

Mr. GROW. Yes. First of all, if you count the CIS and Eastern Europe, that is about 200 million tons of steel capacity out of about 700 million tons worldwide. Now, take the rest of the world. When we bought Geneva about 10 years ago, roughly 45 to 50 percent of the rest of the world steel capacity was government owned or indirectly government owned through government-owned banks and other facilities. I think our industry is unique in that when people became a country they bought airplanes, started an airline, and they built a steel plant. Now some of that has been privatized and some of it, for example, the second largest steel company in the world is the French, Usinor Sacilor, and it was privatized last year. British Steel, which was owned by the British government, was privatized about 3 or 4 years ago. Pohang or POSCO, which is the Korean steel company, is in the process of being partially privatized. We are seeing privatization in Brazil. So we are seeing a change in government ownership in this industry, but we are only about halfway home in terms of privatizing what of the free-world capacity was government owned 10 years ago. But it is still 25 percent, I would say, of the free-world capacity that I compete with in the world market is government owned or government controlled today.

Mr. HANCOCK. Even though it isn't government owned, though, there is still a tendency to protect those industries by the government.

Mr. GROW. Absolutely. And the worst thing that happened in the eighties to the U.S. steel industry was our capacity was beaten down so far we had no export capacity left, and that allowed the cartels, those who control their markets, it allowed them to manage for slight shortage, which allowed them to maintain prices during those periods. So, while they were making money, the U.S. steel industry was getting clobbered, and we, essentially, got behind the curve on modernization and other things, and we have been pulling ourselves up by our bootstraps over the last decade to get out of that, and we have done a very good job. But we still have about the lowest return on investment of any industry in the world, and there are very few steel companies in the United States that are investment grade. So we all pay very high costs for our capital. And, until we fix both this government involvement and the private anticompetitive practices, the privatization of protection, which has gone on so skillfully in Japan and now in other parts of the world,

we are not going to have free and open trade, and we have 20 million new tons in the United States coming online, 20 percent new capacity, which needs to go somewhere. As long as our market is truly open and free, and we are getting 15 to 20 million tons of imports, we need to have the right to export. We are not trying to protect our market. We are trying to get the world markets open so we can do on their 10-yard line what they do on our 10-yard line. That is what keeps a free market open and true competition working.

Mr. HANCOCK. Thank you.

Chairman CRANE. And we welcome Mr. Gridley and Mr. Stewart. We have essentially completed our questions of the panel, but if you folks could condense your presentations, we would like to hear from you with the assurance that all printed material will be a part of the record as well.

Mr. Gridley.

STATEMENT OF DAVID D. GRIDLEY, DIRECTOR, SALES AND GOVERNMENT AFFAIRS, TORRINGTON CO., TORRINGTON, CONNECTICUT

Mr. GRIDLEY. Thank you, Mr. Chairman. We would like to issue a modified version of my prepared text before it is accepted in the next day or so.

Chairman CRANE. Without exception, so ordered.

Mr. GRIDLEY. Mr. Chairman and Members of the Subcommittee, thank you for the opportunity to testify today on the Commerce Department's proposed antidumping regulations as well as other current issues with regard to antidumping law.

I offer the following comments on behalf of the Torrington Co. The Torrington Co. is the world's leading producer of needle roller bearings and is the largest full-line producer of antifriction bearings in the United States.

Torrington has been a petitioner and an active participant in the proceedings involving antidumping and countervailing duty laws. The bearing industry has experienced a prolonged period of excess capacity and targeted dumping by many foreign bearing companies. The domestic bearing industry has been seriously harmed in the past by extraordinary levels of dumping that forced many U.S. producers to reduce capacity, lay off workers, fall behind competitively and, in too many cases, go out of business or sell assets at seriously depressed levels.

The enforcement of U.S. trade laws in the last 8 years has been helpful to U.S. producers of bearings by reducing the magnitude of the unfair trade practices.

At the same time, Torrington's experience with antidumping law demonstrates some of the current problems with the law and its enforcement. Most importantly, many of our foreign competitors continue to dump at significant margins of dumping year after year. While the existence of the orders means importers will pay antidumping duties, the importers are generally related to the foreign producers. The effect has been, in many situations, no positive impact in the marketplace as related party importers absorb the dumping duties and are presumably reimbursed by one means or another by the foreign parent organization.

The lack of a meaningful reimbursement regulation to date and the failure of Congress to implement our international right to treat the absorption of duty as a cost to be deducted from determining the levels of dumping are two of the reasons we have received only partial relief to date.

Similarly, Torrington's effort to prevent the evasion of these orders had been partially unsuccessful. For example, Torrington brought a second dumping case against 14 additional countries in 1991 in an effort to limit foreign producers from shifting production from country to country while continuing the severe dumping practices. The ITC's negative preliminary injury determination ended these cases, basically, ignoring the evasion that was occurring and penalizing domestic producers for engaging in the very activity contemplated in the first set of dumping orders—reinvesting in America.

The result of the negative determination by the ITC was that reinvestment was put in jeopardy; that further reinvestment was postponed and eliminated because of the frustration of the price correction in the marketplace.

It is particularly troubling to have issues such as H.R. 2822 considered when there is no apparent consideration being given to make relief effective and available earlier, actions which would make more domestic product available from domestic producers now.

U.S. antidumping law must be structured and administered in such a way that foreign companies, which are dumping product into the U.S. market, have little or no incentive to evade the law. Torrington has observed numerous methods by the foreign producers to create loopholes in the antidumping orders.

The proposed regulations begin to address two issues of primary importance to domestic companies. First, scope rulings and circumvention of antidumping duties. Unfortunately, the proposed regulations do not go far enough in preventing foreign producers from evading the antidumping orders.

The purpose of the scope ruling is simply to clarify which products have been covered by the existing antidumping orders. The duty reimbursement is another method by which foreign producers frequently attempt to avoid compliance with U.S. antidumping laws.

In order to reduce my comments, one last point is our concern about H.R. 2822. Torrington has previously expressed its opposition to H.R. 2822, the Temporary Duty Suspension Act. Rather than reiterate the entire argument, allow me to stress two points. First and most importantly, careful attention to any of the problems outlined above will help to address the concerns of those industries seeking temporary duty suspension rather than passing of new legislation and, second, temporary duty suspension will discourage reinvestment by domestic producers, as they will be deprived of the market signals to know that reinvestment would be justified.

Thank you.

[The prepared statement follows:]

**STATEMENT OF DAVID D. GRIDLEY
DIRECTOR, SALES AND GOVERNMENT AFFAIRS
TORRINGTON CO., TORRINGTON, CT**

**BEFORE THE SUBCOMMITTEE ON TRADE
OF
THE COMMITTEE ON WAYS AND MEANS,
U.S. HOUSE OF REPRESENTATIVES**

**Department of Commerce Proposed Antidumping Regulations
and Other Antidumping Issues**

APRIL 23, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on the Commerce Department's proposed antidumping regulations, as well as other current issues with regard to antidumping law. I offer the following comments on behalf of the Torrington Company, a subsidiary of Ingersoll-Rand Company.

Torrington is the world's leading producer of needle roller bearings and is the largest domestic full-line producer of antifriction bearings in the United States. Torrington began as a producer of needle bearings, which are used in a variety of products from outboard motors to spacecraft. In the 1980s, Torrington acquired the Fafnir bearing company, which was the leading U.S. producer of ball bearings. The company operates state-of-the-art facilities in Connecticut, producing precision bearings for aerospace and other critical applications. Torrington produces commodity bearings of all types in its plants nationwide, as well as in Torrington's subsidiaries around the world. We welcome the opportunity to offer our perspective on the Commerce Department's proposed antidumping regulations and on other important aspects of antidumping law.

I. Torrington's Experience With U.S. Antidumping Law

The Torrington Company has been a petitioner and active participant in proceedings involving the antidumping and countervailing duty laws. The bearing industry has experienced a prolonged period of excess capacity and targetted dumping by many foreign bearing companies. The domestic bearing industry has been seriously harmed in the past by extraordinary levels of dumping that forced many U.S. producers to reduce capacity, lay off workers, fall behind competitively and in too many cases, go out of business or sell assets at seriously depressed levels. The enforcement of the U.S. trade laws in the last eight years have been helpful to U.S. producers by reducing the magnitude of the unfair trade practices.

At the same time, Torrington's experience with antidumping law demonstrates some of the current problems with the law or its enforcement. Most importantly, many of our foreign competitors continue to dump at significant margins of dumping year after year. While the existence of the orders means that importers will pay antidumping duties, the importers are generally related to the foreign producers. The effect has been in many situations no positive impact in the marketplace as related party importers absorb the dumping duties and are, presumably, reimbursed in one way or another by the foreign parent organization. The lack of a meaningful reimbursement

regulation to date and the failure of Congress to implement our international right to treat the absorption of duty as a cost to be deducted in determining the level of dumping are two of the reasons for the partial relief received to date.

Similarly, Torrington's efforts to prevent evasion of these orders have been partially unsuccessful. For example, Torrington brought a second dumping case against 14 additional countries in 1991, in an effort to limit foreign producers from shifting production from country to country while continuing the severe dumping practices. The International Trade Commission's negative preliminary injury determination ended these cases, basically ignoring the evasion that was occurring and penalizing domestic producers for engaging in the very activity contemplated by the first set of antidumping orders -- reinvesting in America. The result of the negative determination by the ITC was that much reinvestment was put in jeopardy, and further reinvestment was postponed or eliminated because of the frustration of the price correction in the market.

With this experience in mind, allow me to offer a brief perspective on some of the Department's proposed regulations.

II. Department of Commerce Proposed Antidumping Regulations

At the outset, Torrington wishes to commend the extensive effort of the Department of Commerce in preparing these proposed regulations. Both before and subsequent to the promulgation of these regulations, the Department has sought significant input from the public. The comments which follow, like Torrington's critiques throughout this process, are intended to facilitate the development of regulations that will make the administration of the law transparent, predictable and effective.

U.S. antidumping law must be structured and administered in such a way that foreign companies which are dumping product into U.S. markets have little or no incentive to evade the law. Torrington has observed numerous methods by which foreign producers create loopholes in antidumping orders.

The proposed regulations begin to address two issues of primary importance to domestic companies: **scope rulings and circumvention** of antidumping duties. See Proposed Regulation 351.225. Unfortunately, the proposed regulations do not go far enough in preventing foreign producers from evading antidumping orders as potential liability is dependent upon whether product has been suspended from liquidation. Proposed Regulation 351.225(1).

The purpose of a scope ruling is simply to clarify which products have been covered by an existing antidumping order. Accordingly, such a ruling should be made as rapidly as possible and product found to be covered by an order should be covered from the first importation - not from the date of a preliminary scope decision. If changes are needed to U.S. customs laws to permit reliquidation, such changes should be made. Otherwise, U.S. law creates an incentive to evade antidumping duty orders. Such evasion pays handsomely for foreign producers and importers and makes relief illusory. The same principle should be applied in circumvention situations, at least to the extent arguably consistent with WTO obligations.

In addition, in Torrington's experience, circumvention often occurs through distribution channels. For example, Commerce often treats home market sales to unrelated exporters

as though these sales are to "resellers." These "resellers" are then able to obtain their own antidumping margins, which are based in part on the acquisition cost of the good. Under this "reseller rule," dumping margins can "disappear" when the product comes to the United States even though any reasonable analysis would confirm that a significant part of the purchases by the company are intended for export. Commerce regulations do not address this problem.

A potentially related issue involves the "Roller Chain" rule. Under this prior agency practice, Commerce would disregard the imports if they represented less than one percent of the value of the product eventually produced. The rule in effect insulated certain purchasers from antidumping duty liability even if such purchasers constituted the largest share of imports and an important potential market for U.S. producers. When combined with the "reseller" issue reviewed above, the two potential evasion problems presented the potential to drastically reduce the value of dumping orders for many domestic producers. The Uruguay Round Agreements Act changed the "Roller Chain" practice. 19 U.S.C. 1677a(e). This statutory change provides Commerce with great flexibility to assure that the law is not evaded by foreign producers. Proposed regulation 351.402(c)(3) does not contain the same flexibility, which could present practical problems in particular cases. Any final regulation should reflect the great flexibility built into the statute on this issue.

Duty reimbursement is another method by which foreign producers frequently attempt to avoid compliance with U.S. antidumping law. When producers cover the cost of the antidumping duty paid by the importer, the unfair trade practice continues unabated. How a foreign producer chooses to reimburse will vary on the creativity of the foreign producer and the breadth of product line. For example, a major Commerce study showed that U.S. subsidiaries of foreign bearing companies received large extensions of credits from foreign parents following the antidumping orders. See U.S. Dep't of Commerce, Bureau of Export Administration, National Security Assessment of the Antifriction Bearings Industry 36-42 (Feb. 1993). Similarly, concerns were raised during one or more administrative reviews that transfer prices should be examined to determine whether transfer prices were below cost, effectively permitting funds to be transferred from parent to importing subsidiary and also resulting in the undercollection of cash deposits. These and many other options exist and have undoubtedly been used by companies covered by dumping orders to support continued dumping in the U.S. marketplace.

On several occasions, Torrington has asked the Department to investigate reimbursement, and has attempted to give the Department relevant factual information. However, domestic companies simply do not have the data or the resources to fully investigate whether (and to what extent) reimbursement is occurring. Only the Department can make such an undertaking. While the proposed regulation marks a movement from past agency practice on the issue of reimbursement, the movement does not go anywhere near far enough in seeing that reimbursement does not occur or, if it occurs, is negated. Proposed Regulation 351.402(f). Specifically, in its proposed regulation, the Department expands its definition of duty reimbursement to capture reimbursement through related importers and reimbursement of countervailing duties. 60 Fed. Reg. at 7,332. However, there is no indication that Commerce will adopt a more realistic approach to determining when reimbursement occurs. Without a more expansive construction, the reimbursement regulation will remain largely an empty promise of effective relief.

One of the most crucial aspects of an antidumping investigation for domestic parties is the Department's accumulation of complete information from foreign producers. Because U.S. producers do not have discovery rights or other investigatory powers, the Department's data collection process is the only means of gathering the sales, financial and production data crucial to showing evidence of dumping.

Not surprisingly, Torrington's experience suggests that antidumping decisions (of the Department and the International Trade Commission) improve when these agencies have complete - rather than selected - data on foreign producers. Torrington is more than willing to assist the Department in its efforts to reduce the cost of investigations. However, reductions in data collection often result in placing critical issues in jeopardy, and the agencies risk losing their ability to administer the law properly.

III. Other Antidumping Provisions of Particular Importance

Torrington's own experience makes clear that U.S. antidumping law must promote the granting of early relief. The ITC should be encouraged to more aggressively use threat of material injury provisions and to take into account evasion/circumvention issues in considering follow-on cases. Let me provide some history of our cases and the problems facing the bearing industry.

In the 1970s and 1980s, the worldwide bearings market was characterized by significant excess production capacity. A number of large foreign bearing companies pursued aggressive market share expansion programs, operating from home markets where foreign competition was relatively limited or non-existent. Companies like Torrington that were dependent for most of their volume from the U.S. market were caught in a cross-fire as these companies were aggressively dumping into the United States in a battle for increased market share. Torrington and other U.S. producers bore the brunt of this battle.

The result was near-catastrophe for the U.S. industry: many U.S. producers suffered plant closures, lay-offs, R&D cuts, and reduced compensation to workers. Between the late 1970s and mid-1980s, the industry closed 30 plants, laid off 13,000 employees, and lost \$1 billion in capacity.

In response to this extraordinary problem, antidumping and countervailing duty cases were filed against nine countries. After its initial investigations, the Commerce Department established dumping margins of more than 100 percent on many bearing products. As a result of the issuance of orders on a significant part of the imports, domestic producers experienced some price relief in the marketplace. Companies like Torrington took action that was consistent with the perceived restoration of fair prices in the market -- they reinvested as cash flow permitted. Foreign producers also expanded capacity in the U.S. However, the price relief was only partial. While imports dropped from the nine countries, imports surged from a number of other countries, almost all of which had subsidiaries of one or more of the companies found to have been dumping in the original cases.

Facing a deterioration in market prices because of the shifting situs of dumping and the resulting threat to reinvestment commitments made and planned, Torrington was forced to file a second set of antidumping cases in 1991 against 14 additional countries. Despite the obviousness of the evasion that was taking place and the potential for destroying the reinvestment that had been made following the

issuance of the orders, the second case was dismissed by the International Trade Commission at the preliminary injury stage. The fact that domestic companies had started to reinvest and add back employees was held against them by the Commission even though the circumvention or evasion of the orders put in jeopardy the very reinvestment the law is intended to promote. While the Commission's decision was upheld by the Court of International Trade as within its authority to make, such decisions by the ITC frustrate the ability of domestic industries to obtain effective relief and reduce the ability or willingness of domestic producers to reinvest. Considering the interest of some members of the Committee in H.R. 2822, an outcome where relief is delayed (and reinvestment is discouraged) is counterproductive as it retards the ability of domestic producers to supply product in the United States.

Stated differently, U.S. antidumping law should safeguard that relief is available to domestic industries early. Threat determinations should be more readily available so industries need not wait until they are competitively behind to bring cases. Such an approach will minimize economic dislocations both for manufacturers of products and for their customers.

Similarly, U.S. antidumping law should provide incentives for foreign producers to abide by U.S. law. Currently, because of the problems of duty absorption, reimbursement of duties and inability to deduct duties not passed through as a cost in determining dumping liability, as well as the generally prospective nature of scope and circumvention findings, the system encourages minimal compliance by foreign producers. Minimal compliance can drastically reduce the effectiveness of orders and frustrate the ability of companies to reinvest. Some of the problems can be addressed through regulations. Others may require Congressional action.

One suggestion would be to distribute dumping and countervailing duties actually collected to the petitioners to cover investments in plant, equipment, technology, R&D and people during the life of an order. Providing compensation (*i.e.*, disbursement of duties actually collected) should create a powerful incentive for foreign producers to price fairly. Failure to price fairly would result in partial coverage of harm through the disbursement of duties collected. Similarly, a compensation provision would reduce the risk of reinvesting where foreign producers refuse to stop dumping.

Torrington encourages both the Department of Commerce and the Congress to consider establishing clear and meaningful standards with regard to duty absorption. As permitted under the WTO, U.S. law should treat dumping duties that are absorbed by a related party importer (rather than passed on to its customers) to be treated as a cost and deducted from constructed export price in determining dumping duties owed. Importers that absorb the cost of antidumping orders have in effect frustrated the intent of the orders. Treatment of such duty absorption as a cost is consistent with our international obligations under the WTO. Indeed, Article 9.3.3 of the GATT 1994 Antidumping Code permits all WTO signatories to treat antidumping duties as a cost in determining dumping liability when the duties are not passed on to customers in the importing country. Such a provision is part of current European Union antidumping law and applies to U.S. exports to the European Union covered by antidumping orders. U.S. producers are entitled to the full measure of relief envisioned by our international rights.

IV . H.R. 2822 - Temporary Duty Suspension Act

Torrington has previously expressed its opposition to H.R. 2822, the Temporary Duty Suspension Act. See Letter from Robert T. Boyd and David D. Gridley to the House Committee on Ways and Means re Miscellaneous Trade Proposals (March 1, 1996). Rather than reiterate this entire argument, allow me to stress several crucial issues:

First, and most importantly, careful attention to many of the problems outlined above will help to address the concerns of those industries seeking "temporary duty suspension" as provided in H.R. 2822. Users of dumped products under existing law enjoy the false market signals of dumped imports for too long before corrected market signals emerge. Such false market signals can result in users of dumped merchandise making erroneous investment and other decisions with resulting multiple levels of misallocation of resources. Early and effective relief will both reduce the erroneous contraction of capacity and supply and prevent erroneous expansion by users in situations where competitiveness is premised upon dumped pricing of inputs.

Second, temporary duty suspension would discourage reinvestment by domestic producers, as Torrington and other producers would be deprived of the market signals to know that reinvestment would be justified.

Third, an antidumping duty order never creates a shortage of product. An order does not regulate quantity; it merely requires foreign producers to sell and U.S. importers to pay a fair price for foreign merchandise. Hence, H.R. 2822 is a solution for a non-existing problem.

V. Conclusion

The Torrington Company commends the Department of Commerce on the major efforts made to date to solicit views and consider concerns of the public with the regulatory scheme for antidumping and countervailing duty laws. Torrington will be submitting views to Commerce as part of its notice and comment process. While much of what has been proposed appears acceptable and satisfies various criteria important to Torrington (i.e., making relief effective, predictable and available to industries regardless of size), there are areas where the proposed regulations need modifications.

At the same time, there are a host of issues not addressed by the regulations or existing law that hamper the ability of injured domestic industries to obtain relief early and to safeguard against the construction of U.S. law encouraging evasion of any antidumping orders. These issues should be addressed promptly. Addressing the problems which make relief partial and late would address some of the underlying concerns of users. There is no need for H.R. 2822, which does not address the underlying problem of misallocation of resources caused by dumping.

Again, thank you for the opportunity to testify.

Chairman CRANE. Thank you.
Mr. Stewart.

**STATEMENT OF TERENCE P. STEWART, MANAGING PARTNER,
STEWART AND STEWART, WASHINGTON, DC**

Mr. STEWART. First, Mr. Chairman, thank you for the courtesy of letting us testify at the end. I apologize for being late.

In my prepared remarks, we take a systemic approach to an examination of the proposed regulations. Obviously, they are simply proposed, and we believe many of the concerns of all parties will be addressed in the final regulations.

Let me just touch on a couple of points vis-a-vis the regulations from a policy point of view that are of concern to me.

First, there are a number of proposed regulations which call into question whether the regulations, if adopted as proposed, would make the relief provided effective. Mr. Gridley has talked about reimbursement. He has also talked about scope rulings and circumvention. I concur in those issues. Those are very important issues to domestic users of the law if the law is to be effective.

Second, some of the proposed regulations call into question whether the regulations provide equal access to the laws for both large and small countries and industries alike. Let me give one example of that because we have had the privilege, over time, to represent both large and small companies and industries, and there is a deep concern about the ability of small industries to be able to access these laws.

One of the changes made in U.S. law was to add an averaging provision during investigations, with the exception that averaging would not need to be done where there was targeted dumping. Unfortunately, in the proposed regulation, targeted dumping requires an affirmative submission by the petitioning industry, regardless of how clear the justification for using the exemption might be on the face of the questionnaire responses from the foreign producers. This places a large burden on small industries to actively participate, whether or not they have the means to do so, and will discourage small industries, in my opinion, from being able to use these laws.

Third, some of the proposed regulations call into question whether the regulations will promote predictability. All parties, whether you are a domestic producer who brings cases or whether you are a foreign producer who gets caught up in a case, whether you are an importer or user in the United States, has a vested interest in having these laws be predictable.

Level of trade, as currently formulated in the proposed regulations and currently being administered, creates enormous uncertainty on both sides. From a respondent's point of view, at the moment, there is no certainty as to how level of trade will be determined. From a petitioner's point of view, there is great uncertainty as to whether level of trade will be capable of manipulation where you could have the same sale to the same customer from the same party in three different time periods treated as three different levels of trade simply by control of functions by the foreign producer.

We believe all of those types of issues need to be addressed by the Commerce Department in rendering its final regulations.

With regard to other antidumping issues, we believe Congress should be examining the law, as it has in the past, with three principles in mind. First, to have the least disruption in the market, relief should be available early. When relief is available early, there are few instances of no or short supply alleged. It is also the case that domestic producers are not behind.

Second, relief, when it is made available, should be effective.

Third, there should be an effort to minimize the costs for all parties participating, but certainly for the domestic industries that need to invoke it. I previously submitted views on short supply. I would be happy to answer questions, but won't address those.

I would like to address, just briefly, some of the studies that have been done, including the ITC study of 1 year ago. There was a great deal more information put onto the record in that investigation, and there was a great deal of controversy over which model should be used in evaluating the economic effects. Unfortunately, the report that came out picked a single methodology without showing the results that might have occurred under different models that had been proposed by the parties. They picked a model that the Commission staff had itself in earlier investigations indicated was not the most appropriate to measure the effect on the economy of particular product segments and did not address a range of issues raised by domestic parties which called into question some of the conclusions.

Obviously, the cost benefits of the trade laws are an important issue. The ITC is an important, independent body. We believe it would be appropriate for this Subcommittee to request further clarification and expansion upon what is already in the record so that, in fact, all variables are known by this Subcommittee and other interested parties and so that there are not concerns about a bias existing in the data base or the presentation.

Thank you very much, Mr. Chairman.

[The prepared statement follows:]

STATEMENT OF
TERENCE P. STEWART
MANAGING PARTNER, STEWART AND STEWART

BEFORE THE SUBCOMMITTEE ON TRADE
OF THE COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

"Department of Commerce Proposed Antidumping Regulations
and Other Antidumping Issues" (TR-21)

April 23, 1996

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify today on a subject I believe is critical to economic growth in the country and to the ability of communities, businesses and workers to support further trade liberalization -- maintenance of strong trade laws to assure that trade flows reflect underlying comparative advantage and not artificial advantages flowing from closed markets or the deep pockets of foreign competitors. As a practitioner here in Washington with a heavy concentration of activity in international trade law issues, I actively followed negotiations in Geneva during the Uruguay Round of the antidumping and subsidy agreements and worked closely with the Administration and Congress during the consideration of the Uruguay Round Agreements Act. My firm has provided extensive comments to the Commerce Department on issues that should be addressed in its proposed regulations and will be submitting extensive comments on the February proposed regulations. I offer the following testimony in my individual capacity. The views presented do not necessarily reflect the views of our firm's clients or of other members of the firm.

I. The proposed Commerce regulations

Because of the extensive modifications to our international obligations on a range of procedural and substantive issues, Congress and the Administration have focused considerable attention on implementation of our rights and obligations both in the statute and Statement of Administrative Action. The proposed regulations are another step in implementing our rights and obligations.

From a practitioner's perspective, the proposed regulations should be measured on a number of grounds: (a) consistency with U.S. statute, (b) consistency with the Statement of Administrative Action, (c) whether the regulations will promote conditions of fair trade once an order is entered (stated differently, whether the regulations make relief when granted effective), (d) whether the regulations promote early relief, (e) whether the regulations promote transparency and provide meaningful due process rights for all parties, (f) whether the regulations provide equal access to the laws to large and small companies and industries alike and (g) whether the regulations promote predictability.

While the above seven measures drive the following comments, I start by making some preliminary observations. First, the proposed regulations are obviously just that. Commerce does not yet have the benefit of comments from the public on how its proposed regulations conform to the above or other criteria. Therefore, the following comments are not intended as a criticism of Commerce's efforts but rather highlight my perspective on some of the open questions that remain about the drafting exercise.

Second, I wish to commend the people at the Commerce for the efforts that they have made to reach out to all elements of the public for views and for making those views easily accessible (e.g., via internet) for review and comment by others. The proposed regulations reflect a great deal of hard work by many very dedicated and talented people. Much of what is included in the proposed regulations conform to the seven measurement criteria previously described. I am sure that by the time the comment process is completed and final regulations are released that the end product will indeed conform to the above objectives. Indeed, it is my understanding that Commerce will go to the unusual step of holding a public hearing on the proposed regulations once comments have been submitted.

Third, it is important that Commerce avoid the temptation to regulate prematurely on issues on which the agency has limited current experience so that the metes and bounds of issues can be explored before regulations are adopted.

Finally, the comments here are not intended as a substitute for the detailed comments that Commerce has requested from the public.

With these preliminary comments, I offer just a few observations on several draft regulations where there appear to be concerns from a petitioner's perspective.

1. **There are a number of proposed regulations which call into question whether the regulations, if adopted, would make the relief provided effective**

Domestic industries that are injured by dumped imports are looking first and foremost for effective relief. If dumping orders can be frustrated or easily circumvented or if administration of the laws indirectly encourages less than complete cooperation or correction of injurious pricing practices, effective relief is not provided.

Unfortunately, a number of the proposed regulations will not or may not promote effective relief. Let me review just a few examples.

(a) Reimbursement

One way to frustrate the remedial purpose of the law is for the foreign producer to cover the cost of the antidumping duty that an importer must pay. When this happens, the unfair trade practice continues and is not offset by the imposition of dumping duties. Prices remain depressed in the market and domestic producers lose the opportunity to sell to importers who continue to receive dumped prices in fact. Because of this reality, Commerce has long indicated that reimbursement will be handled by treating the reimbursement as an additional expense to be deducted in determining dumping margins. However, the provision has historically been very narrowly construed by Commerce permitting foreign producers to create a wide variety of mechanisms to reimburse in fact without ever being caught by the law.

Duty reimbursement can take many forms, only some of which are direct. While it is, of course, welcome that Commerce will treat the direct payment of antidumping duties by the foreign producer or the tendering of a check for the identified purpose of reimbursement as constituting reimbursement, obviously most foreign producers and importers are more sophisticated and can mask the reimbursement effort. For example, where foreign producers are related to the importer, transfer prices can be manipulated to permit

reimbursement of duties paid. In these and other situations, foreign producers can rearrange prices on other merchandise to cover dumping duty liability, can change prices for goods or services from the purchaser, can extend payment terms, make loans or cash infusions (e.g., related party importers), or take any number of other steps to reimburse duties. These more subtle means of reimbursing antidumping duties have to date been unactionable not by statute but by agency inaction.

It is true that Commerce's proposed regulation for addressing reimbursement (351.402(f)) constitutes an improvement over the existing regulation and reflects some of the case law advances that have occurred in recent years. For example, coverage of reimbursement is defined to cover related party importer situations and not just unrelated importers as was the situation for many years. Similarly, coverage of the payment of countervailing duties as a form of reimbursement is long overdue. While the proposed regulation is thus an improvement over prior regulations, Commerce has not expressed an intention to adopt a more realistic construction of reimbursement. Commerce should provide broader latitude to this important provision.

(b) Scope rulings and Circumvention

When U.S. law is construed to permit "creative" entry procedures or claims that avoid liability for antidumping duties until caught and adjudicated, the remedial purpose of the antidumping law is deeply frustrated. Instead, dumpers are rewarded for bending the truth or finding a customs port where merchandise can enter without being identified as covered by an order. Domestic producers, who do not have discovery rights and cannot access importer records at Customs, will be denied relief unless and until they trip upon the avoidance/evasion scheme, expose it and have Commerce investigate (up to 300 days for a circumvention inquiry under the proposed regulations).

Unfortunately, the proposed regulation (351.225) on circumvention and scope rulings suggest that just such an incentive to frustrate effective relief will continue. Scope rulings -- which merely clarify what has been covered by the order all along -- must be retroactive, yet often are not. For example, in a case my firm has handled, a foreign producer classified merchandise that should have been covered by the order under an HTS number that did not alert Customs that suspension of liquidation should occur. It took my client several years to discover what was happening. While Customs and Commerce took corrective action once alerted to the problem, the corrective action was prospective only. Based on public census data, tens of millions of dollars of merchandise that should have been covered by the antidumping order has escaped any liability. Such a result is simply unacceptable. If liquidated entries cannot be reliquidated, then the Administration should propose to Congress amendments to U.S. law to permit the reliquidation of such entries to assure all dumping liability has been paid.

Similarly, Commerce's proposed regulations reject a proposal to order suspension of liquidation as soon as a circumvention inquiry is initiated (or is legally permitted under the WTO) and impose cash deposits retroactively if a final decision is affirmative. Commerce cites the business uncertainty that would be created by such a system. Commerce ignores the business uncertainty created for injured domestic producers faced with a flouting of the laws that will go uncorrected for as much as 300 days after the filing of a circumvention petition. I would urge Commerce to reconsider the proper balance in such situations.

2. Some of the proposed regulations call into question whether the regulations provide equal access to the laws to large and small companies and industries alike.

An important change to U.S. antidumping law contained in the Uruguay Round Agreements Act was the adoption of the requirement that in investigations, price comparisons be made on an average-to-average or transaction-to-transaction basis. An important exception to this new requirement was insisted on by U.S. negotiators in Geneva and was incorporated into U.S. law -- averaging will not be used where masking of dumping margins would be the result. 19 U.S.C. 1677f-1(d). This targeted dumping exception is greatly reduced in importance by the proposed regulations. No matter how obvious the targeting is from the questionnaire responses of foreign producers, Commerce has proposed ignoring the targeting unless domestic producers make specific allegations within narrow time lines. Such an approach of necessity increases the costs for domestic producers who must participate actively for every company investigated or be prejudiced by Commerce not conducting a proper investigation. For many smaller industries, domestic producers are simply unable to actively participate at Commerce because of their injured status and the costs of participation. These industries rely on Commerce's ability to investigate all relevant issues. Failure of Commerce to examine targeted dumping could be highly prejudicial to such industries. Such an approach is also inconsistent with treatment given to respondents who are currently able to raise claims of "clerical error" to reduce dumping margins at any time.

3. Some of the proposed regulations call into question whether the regulations promote predictability.

One of the important changes to U.S. law was conformance with the long-standing international rights to construct an export price through, *inter alia*, the deduction of a reasonable profit on resale. One of the items examined in light of the change in U.S. law was the potential need for more frequent resort to a level of trade adjustment. 19 U.S.C. 1677b(a)(7)(A) was added to U.S. law to address the issue. The statute on its face provides a fairly straightforward and common sense approach to the question:

- (1) if there is a level of trade difference,
- (2) the level of trade difference involves the performance of different selling activities and
- (3) the level of trade is demonstrated to affect price comparability,

then an adjustment will be granted.

In many of the outstanding orders, parties have been in agreement for years as to what are the proper levels of trade (e.g., original equipment manufacturers; mass merchandisers; distributors, etc.).

Despite the clarity of past practice and the potentially straightforward construction of the new statutory language, the proposed regulation of Commerce (351.412(c)(2)) and early case law suggest that level of trade issue will be extraordinarily complicated, potentially subject to manipulation by foreign producers and will drastically reduce the predictability on the correct standard that could have been achieved by a different approach. Early case law suggests that a sale to the same customer by the same producer in different

review periods could be viewed as being at a different level of trade in each review simply by the change of selling functions provided each year. Such an outcome can't possibly be correct.

Hopefully Commerce will be able to address the above comments and comments on other proposed regulatory provisions in the months ahead as it receives comments from the public and goes through its hearing process. I join the many other practitioners preparing comments in wishing them success in their complex undertaking.

II. Some Other Antidumping Issues

My firm has had the privilege over the years to work with a wide variety of industries facing trade problems in the United States and abroad: metals, chemicals, industrial products, autos and auto parts, consumer goods, electronic components, construction materials, and agricultural and horticultural products. At some point in time, almost every sector of our agricultural and industrial base has had an important trade problem that has clouded its future viability. For many industries, for millions of workers and for tens of thousands of communities across our country, the antidumping law has been a critical resource to prevent the loss of companies and jobs to false market signals. The law's effectiveness can mean the difference between survival and death for industries and communities. Article VI of the GATT 1994 states that injurious dumping is to be condemned, the harshest language used in the entire WTO. Many of our trading partners have antidumping laws and increasing numbers are using them, consistent with their WTO rights, to see that their industries compete against fairly traded foreign goods.

Yet, despite the potential for good and our international rights under the WTO to secure conditions of fair trade where injurious dumping is occurring, too many industries have not survived despite their international competitiveness. U.S. law has often been ineffective in part or in toto. Trade cases have occasionally been overly politicized. And far too often relief has been too long delayed or simply denied.

Within our international rights and obligations, relief could be:

- effective;
- short-term;
- minimally disruptive;
- available to all industries regardless of size or means.

Let me briefly explain. More than half of all anti-dumping cases filed result in a negative injury determination by the International Trade Commission. Very few cases are decided affirmatively on a threat basis. Such statistics mean that domestic industries are generally seriously harmed before a case can be brought that will get past the current construction of material injury in U.S. law. Yet, of necessity, if relief is delayed until plants have closed, research and development has been slashed, capital expenditures have been curtailed, workers are laid off and those remaining receive lower income, the domestic industry will likely be behind its foreign competitors. If true, relief will need to be in place longer to restore conditions of competitiveness.

Secondly, to the extent that relief provided is ineffective to some extent, relief will be needed longer if the domestic industry is to recover the strength it would have had

but for the unfair trade practices. Yet, current law and practice create some significant loopholes or incentives to reduce the effectiveness of the remedy being provided.

Third, if relief is available early, U.S. purchasers of dumped merchandise do not have long-term purchasing patterns that may lead to a misallocation of resources by purchasers based upon false advantages flowing from dumped prices. Early relief will thus reduce the concerns that are often raised today from a perception of lost "bargain" by users. Both suppliers and purchasers should have a mutually reinforced interest in conditions of fair trade. Yet, when purchasers have structured their own product pricing over time on the basis of dumped prices for inputs, the reaction to fair prices has tended to be extreme. In some situations, long-term dumping may result in misallocation of resources by users based on the false market signals being sent. Restoring conditions of fair trade may result in correction of allocation of resources at both supplier and user levels. Early relief would eliminate the yo-yo effect of misallocation of resources and eventual correction.

Fourth, reducing the cost of bringing a case and making relief available earlier would enable domestic industries to file narrower cases as circumvention problems could be readily addressed with reasonable certainty.

Finally, despite a range of efforts by Commerce and the International Trade Commission, access to the legal process for domestic industries is not equal. Costs for getting a case initiated are very significant; there is no organized pro bono assistance to small industries. Pro se litigants have a fairly poor record before the agencies.

Yet, all of these issues can be addressed. Some can be addressed by the agencies involved without legislation. Others may require legislative changes. Let me just outline quickly some of the changes that could be made:

1. Make relief available early

While the current construction of the "material injury" and "threat of material injury" standards have been often upheld by the federal courts, U.S. law need not be construed to make threat findings so difficult to obtain nor does U.S. law require such a large percentage of cases to be determined negatively. Congressional oversight, a review by the ITC of its past decisions and what impediments it perceives exist that prevent it from making relief available earlier and/or statutory changes are options that should be considered. Statutory changes should be considered to make it a factor of material injury or threat that another order on the same product was entered in the last three years. Expedited time schedules for such situations might also be considered.

2. Make relief effective when granted

The administration of the law should encourage compliance by foreign producers with the underlying objective -- elimination of unfair trade practices:

- (1) Scope decisions should have retroactive effect to the issuance of the order; circumvention decisions should have retroactive effect to the earliest date permitted under anticipated WTO disciplines.
- (2) The law should be changed if necessary to permit liquidated entries to be reliquidated where merchandise has been entered without posting of

dumping duties or otherwise been erroneously liquidated without payment of duties that should have been paid.

- (3) Commerce should broadly construe the term, "reimbursement" to minimize the practice in fact.
- (4) Congress should modify U.S. law, consistent with our WTO rights, to permit dumping duties that are absorbed by a related party importer and not passed on to its customers to be treated as a cost.
- (5) Congress should modify U.S. law to have antidumping duties that are actually collected distributed to petitioners to cover investments in plant, equipment, technology, and people (including training). Such a system would not only speed the ability to reinvest but would probably be the greatest incentive to foreign producers to price fairly.
- (6) Congress should modify U.S. law to permit access to importer's records at Customs by counsel for domestic parties under administrative protective order.
- (7) Congress should modify the definition of customs fraud to include importations by importers without the posting of antidumping duties where a product is found subject to an order and the importer did not obtain a scope ruling from Commerce.

3. Minimize the costs of domestic participation

Just as U.S. law and Commerce practice provides some special treatment of smaller foreign producers covered by investigations, so too Commerce and the ITC should minimize the cost of participation by both minimizing the procedural requirements and supporting documentation needs and by reviewing its draft regulations to see that minimal participation at Commerce is needed to have all legal and factual issues explored in fact.

Similarly, the Administration, the U.S. International Trade Commission and the national and local bar associations should work together to provide meaningful pro bono assistance for companies wishing to participate but unable to afford legal assistance. Such assistance should be available to domestic producers, foreign producers and importers. Past efforts to move in this direction have not been fruitful.

III. Short Supply (Temporary Duty Suspension)

I submitted written views on H.R. 2822 on March 1st. I refer the Committee to my full views submitted at that time. Let me just summarize now what I have previously stated.

H.R. 2822 would provide the Department of Commerce with the discretion to suspend antidumping and countervailing duties for up to one year, if Commerce determined that "prevailing market conditions" related to the availability of the product in the United States make imposition of such duties inappropriate.

This proposal is neither necessary, justified nor appropriate. Indeed, the proposal would continue or exacerbate the problem (injurious price discrimination) while ignoring the reasons behind reduced domestic product availability -- relief is available late, is only prospective and is often only partially effective because of evasion, circumvention and duty absorption by importers related to the foreign producers engaged in dumping. Congress should address the causes of

domestic industry problems -- specifically, those that I have identified above -- and not pursue an approach which would complicate the ability of injured industries to regain competitiveness and market share.

Our unfair trade laws do not impose penalties upon foreign producers who dump or receive subsidies on their products. Foreign producers and their importers are simply required to sell or buy product at a fair price or have the importer pay the difference to the U.S. government. Domestic producers are not compensated for past harm. Treble damages are not assessed. Yet, the continuation of dumping in such situations can significantly restrict the ability of U.S. companies to reinvest, reopen facilities, increase R&D or add personnel or upgrade training. Thus, Congress should consider ways to speed relief and make it time effective. Such actions would make more domestically-produced product available earlier.

Users of imported items are often concerned about the logic of paying fair value (i.e., non-dumped prices) for imported merchandise if such products are in fact not produced in the U.S. The logic presumably is that bargains that do not hurt domestic producers should not be eliminated. There is no logic to any claim of "shortage" of product by reason of antidumping or countervailing duty orders, as the orders do not restrict supply; rather foreign producers and importers are encouraged to charge and pay a fair value.

Domestic producers would agree that items which are truly not produced in the U.S. and for which U.S. producers have no intention of producing under conditions of fair trade should be excluded from the order. Indeed, Commerce and the International Trade Commission during investigations and Commerce after orders are issued routinely exclude merchandise or "clarify" the scope of an outstanding order to eliminate items where there is no interest. See, e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, et al, Inv. Nos. 701-TA-319-332, 334, 336-342, 347-353 (Final) and Inv. Nos. 731-TA-573-579, 581-592, 594-597, 599-609, and 612-619 (Final), Vol. II at I-3 - I-5, n. 1, Publ. 2664 (August 1993). Similarly, even after an order is issued, if there are products covered by an order that are not of interest to the domestic industry, the order can be modified. See, e.g., Certain Cut-to-Length Carbon Steel Plate from Canada, 60 Fed. Reg. 61,536 (Dept. Comm. 1995).

In short, there has been no showing that the existing system does not adequately address the alleged problem. However, false price signals in the market due to dumping or subsidization can and do result in companies abandoning products or not commencing production. Without the corrective influence of a dumping order, such domestic producers will never receive the price signals in the marketplace needed to determine whether it is rational for them to resume or commence production.

Indeed, orders are the only means for restoring a reasonable market price signal; if domestic producers have been pushed out or reduced their presence in a product, only restoration of fair prices will provide the market signals to encourage companies to reexpand or reenter markets. H.R. 2822 would eliminate the ability to reenter the market for many producers.

IV. While past studies constitute a start
to understanding the costs/benefits of trade laws,
much work remains to be done
to evaluate all benefits
or to properly evaluate the true costs

The U.S. International Trade Commission conducted a study during 1993-1995 of selected industries on which

antidumping duty orders were outstanding. Its report was released in June 1995 and resulted in sharply divided views by sitting Commissioners on its utility. The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements, Inv. No. 332-344, USITC Pub. 2900 (June 1995). Having participated actively in the investigation on behalf of several clients, I am thoroughly familiar with the record before the Commission and the Commission report. While the report was an important undertaking, I was personally disappointed that the Commission report did not systematically review the range of issues raised by domestic parties and did not undertake at least alternative modeling efforts or better document the underlying assumptions and variables used in the model that was used. Nonetheless, the Commission staff expended a great deal of effort in compiling an initial report. The investigation resulted in a great deal of information being gathered by the Commission staff. That data should be further analyzed by the Commission staff to present certain supplemental information to the public including the following:

(a) a list of arguments and facts raised by domestic parties who had used the trade laws and how such arguments and facts were addressed in the Commission report;

(b) a list of all assumptions and variables used in the CGE model and what the results would have been had a partial equilibrium model been used to assess changes in production, employment, imports and exports at the sector level, such as was done in the USITC investigation on Potential Impact on the U.S. Economy and Industries of the GATT Uruguay Round Agreements, Inv. No. 332-353, USITC Pub. 2790 (June 1994);

(c) a quantification of the positive effects of trade relief identified by the various parties to the investigation and in the Commissioner views.

The model that was used by the Commission staff has been acknowledged by the Commission staff in other investigations to be less well suited to evaluate sector-specific effects. Yet, the antidumping and countervailing duty laws address specific products. Using a model that may be reasonable at measuring macroeconomic effects under certain circumstances, but not using a model recognized in the past by the Commission staff to provide a more accurate reading on micro-trade issues, should raise concerns about the accuracy of the findings made.

No study on a subject of such importance to so many industries should be released without a full listing of underlying assumptions, variables used and sources so that the reasonableness of the results can be evaluated.

The Commission staff is highly professional and should be commended for its initial effort. Yet, many unanswered questions remain. For informed comment to occur and for the study to be the basis for factual (as opposed to merely political) analysis, the Commission should amplify on its prior report so that all arguments and facts and all assumptions are clearly understood.

I would be pleased to respond to any questions. Thank you.

Chairman CRANE. Well, we thank you. Mr. Houghton, do you have any remaining questions?

Mr. HOUGHTON. No, I don't.

Chairman CRANE. If not, that concludes our testimony on anti-dumping issues. Many thanks to all of you for sharing your views and expertise with us. The hearing is adjourned.

[Whereupon, at 2:32 p.m., the hearing was adjourned.]

[Submissions for the record follow:]

STATEMENT OF
HORST E. BUELTE
ON BEHALF OF
THE AMERICAN INSTITUTE FOR INTERNATIONAL STEEL ("AIIS")

INTRODUCTION

The American Institute for International Steel, Inc. ("AIIS") welcomes this opportunity to comment on the Commerce Department's proposed antidumping regulations and H.R. 2822, the "Temporary Duty Suspension Act." AIIS is comprised of steel importers, exporters and related enterprises in North America who serve the needs of steel users throughout the world and are committed to economic growth through competition in steel trade.

AIIS has been working closely with the Commerce Department on the preparation of regulations implementing the commitments set forth in the World Trade Organization (WTO) agreement on Antidumping. These rules are of tremendous importance for the international trading system, because antidumping has become the protectionist weapon of choice, both here and overseas. Fifty-six countries, including all major trading nations except China, have passed new or revised antidumping laws in the past two years. China is expected to issue its new law later this year. The way the U.S. applies antidumping rules to imports is therefore likely to be applied by other countries to U.S. exports.

Our goal is to help Commerce to issue regulations implementing the WTO rules in a way that is fair, fully consistent with the WTO rules, and sensible from a business person's perspective. In this connection, we are pleased that the draft regulations recently proposed by Commerce demonstrate an increased awareness of the desirability of designing measures that reduce costs and streamline procedures.

Some of the proposed Commerce regulations, however, openly violate the WTO rules, which the U.S. and 120 countries signed, such as the proposal to deduct reimbursed countervailing duties from the U.S. price in the dumping margin calculation. On most major issues, Commerce has opted for ambiguity and a lack of guidance rather than clear rules. Commerce claims that, for many of the key issues, it needs to gain more experience administering the new law before it can develop regulations. This will result in a lack of predictability for foreign producers and exporters, and U.S. importers, and is likely to lead to more decisions by Commerce based on adverse "facts available" (previously known as "best information available" -- "BIA").

In addition, Commerce states in the preamble to the proposed regulations, that its existing practices are adequate to address situations in which products covered by an antidumping order are not available from domestic sources. Contrary to the Commerce Department's assertion, the existing practices are wholly inadequate to address situations of no domestic supply. For this reason, AIIS supports H.R. 2822, the Temporary Duty Suspension Act.

AIIS looks forward to working with the Congress and the Commerce Department on the final regulations.

1. Temporary Duty Suspension

The proposed regulations do not include any provision for the temporary suspension of antidumping or countervailing duties (a provision which AIIS has consistently advocated) when a product covered by an order is not available from domestic sources. There is language in the preamble to the proposed regulations in which the Department claims that its existing practices are adequate to address valid concerns of lack of domestic production either through changed circumstances reviews or through clarification of the scope of an investigation during the early stages of the proceeding.¹ In fact, changed circumstances reviews are rarely conducted by the Department, and petitioners must agree to exclude a product from the scope before Commerce will actually do so. Thus, these avenues do not address U.S. manufacturers' short supply concerns.

2. Deduction of Reimbursed Countervailing Duties from Dumping Margin Calculation

The proposed regulations provide that in calculating dumping margins, any countervailing duties paid on behalf of the importer or reimbursed to the importer by the producer or exporter are to be deducted from the export price or the constructed export price. This would mean that any importer subject to payment of countervailing duties would be found dumping as well by the amount of the countervailing duty, even if its prices were identical in both markets.

This is a new provision for which there is no basis in the U.S. law on the WTO Agreements. Commerce claims that it is required to make this deduction because of a statement contained in the Senate Finance Committee Report on the URAA legislation, despite contrary language on the House and Senate floors. This proposed rule would result in the double-counting of the duty by charging the full amount of the duty twice -- once as a countervailing duty and once as part of the dumping duty. This violates the WTO Agreements which the U.S. signed in 1994.

3. Pre-Initiation Comments

The Department rejected the proposal supported by AIIS that the Department should retain the authority and discretion to request information from potential interested parties prior to initiation of an investigation, when it is deemed appropriate. The proposed regulations stipulate that only comments pertaining to industry support for the petition may be submitted prior to the initiation of an investigation. The 1994 legislation permits the Department to seek other information. In eliminating its own authority to seek information it deems appropriate, Commerce is contravening Congress's intent of avoiding unwarranted investigations. (See *United States v. Roses, Inc.*, 706 F.2d 1563, 1569 (Fed. Cir. 1983).

4. Automatic Duty Assessment

A significant change in the proposed regulations from current practice involves automatic duty assessment in situations when no review is requested. Under the current regulations, if no review is requested, duties are assessed at the cash deposit or bonding rate applicable to the specific entries in question. Under the proposed regulations, if no review is requested, duties will be assessed at the rate determined in the most recently completed segment of the proceeding.²

¹ Antidumping Duties; Countervailing Duties; Proposed Rules, 61 Fed. Reg. 7308, 7323, Feb. 27, 1996 (Dep't Comm.) ("Proposed Rules").

² It should be noted that there may be a contradiction in the proposed regulations. The preamble to the regulation on automatic duty assessment indicates that there is no change from the existing regulations. The actual proposed regulation, however, states
(continued...)

This change presents a huge problem for importers and exporters because of the lack of predictability (for all parties -- the domestic industry, foreign producers and exporters and importers) as to what the assessment rate will be if no review is requested. Under the current rules, all parties can determine whether it is in their interest to request a review, because they know at the time they must request the review that the assessment rate will be the cash deposit rate if no review is requested. Under the proposed rules, however, parties have virtually no way of predicting what the ultimate assessment rate will be if there is another review pending. This will result in an increase in the number of administrative reviews that will be requested, and a period of 1 to 3 years in which importers and customers will not know what the ultimate duty liability is.

5. Affiliated Parties³

Under the new statute, parties may be deemed "affiliated" if one party is in a position to exercise restraint or control over another. The proposed regulations fail to provide any guidance on how the Department will determine when one party is in such a position to exercise such restraint or control another, and rejected outright proposals requiring actual evidence of control before parties could be considered affiliated. The preamble to the Proposed Regulations states:

"Affiliated persons" is a new statutory term embodying new concepts, and the complexity of the relationships potentially covered by this term mitigate against the issuance of detailed regulations at this time. [...] Therefore, the Department intends to apply this new definition on a case-by-case basis...⁴

As a result of the lack of guidance in the regulations on this issue, it will be very difficult, if not impossible, for companies involved in an antidumping or countervailing

²(...continued)

that automatic duty assessment will be based on the rate determined in the most recently completed segment of the proceeding.

³ Under the new statute, affiliated parties are defined as follows:

(A) Members of a family, including brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants.

(B) Any officer or director of an organization and such organization.

(C) Partners.

(D) Employer and employee.

(E) Any person directly or indirectly, owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization.

(F) Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

(G) Any person who controls any other person and such other person.

... a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.

19 U.S.C. § 1677(33) (1994).

⁴ Proposed Rules, 7310.

duty investigation to determine whether they should treat another entity as an affiliate, which would therefore require the reporting of sales or costs by that other entity. The lack of clarity and predictability in this area is likely to result in more findings based on adverse "facts available."

6. Arm's Length Test⁵

In public comments on the proposed regulations, several commentators suggested that Commerce set forth some clear rules on how to determine when home market prices to an affiliated purchaser are comparable to prices charged to unaffiliated purchasers (i.e., the arm's length test). If Commerce determines that sales to an affiliated party are not at arm's length prices, Commerce requires that the prices and expenses of the affiliate to an unaffiliated party must be reported. This requirement resulted in the extensive use of "best information available" in the 1992 flat-rolled steel cases. The proposed regulations fail to provide any guidance on the arm's length determination "because of the complexity of this issue, and because the Department's practice in this area is still evolving."⁶ The effect of the lack of clear rules in this area will be a likely increase in decisions based on adverse "facts available."

⁵ Under current practice, Commerce will only consider sales to an affiliated party to be arm's length if the weighted average prices of each product charged to each affiliated party are at least 99.5 percent of the weighted average prices charged to all unaffiliated parties combined.

⁶ Proposed Rules at 7333.

STATEMENT OF AMERICAN WIRE PRODUCERS ASSOCIATION

OVERVIEW

The AWPA represents a significant and dynamic part of the American steel industry. AWPA active members are located in the United States and manufacture all types of steel wire and wire products. These products include barbed wire, wire strand, tire cord, mesh and fencing products, nails, springs and wire garment hangers. AWPA members purchase carbon, stainless and other alloy steel wire rod from domestic and foreign sources, and they process or "draw" the wire rod into wire which may then be further processed into wire products. Major consumers of wire and wire products include the automotive, agricultural and construction industries.

The AWPA also includes virtually all of the US and Canadian manufacturers of steel wire rod – the wire industry's basic raw material – as well as producers of wire and wire products in Canada and Mexico.

The 93 member companies of the AWPA operate 220 plants in 35 states, and they employ over 60,000 dedicated and productive American workers. These companies represent 70 to 80 percent of all US manufacturers of wire and wire products. It is estimated that the total annual shipments by AWPA members exceed \$15 billion. The average number of employees for AWPA's wire drawing companies is approximately 230. While this average includes the large companies that employ significantly more workers, they usually operate several small plants with less than 100 workers, each in different states, supporting a different local economy.

The member companies of the AWPA are part of a diverse and dynamic US steel industry. With the companies in our sister associations of steel mini-mills, pipe producers, cold finished bar manufacturers, and others, we have changed the face of the American steel industry. The steel industry long ago ceased to be a monolithic group of a handful of integrated steel producers. Instead, the steel industry today is a vibrant, diverse and innovative contributor to economic growth and prosperity in the United States. The old image of "Big Steel" has been superseded by a mosaic of efficient, energetic and state-of-the-art companies which can successfully meet the challenge of global competition.

SUPPORT OF THE TEMPORARY DUTY SUSPENSION ACT (HR 2822)

The AWPA endorses the Temporary Duty Suspension Act (HR 2822) and respectfully urges the members of this Committee to support its passage. The Act will remedy the unintended effect of the antidumping and countervailing duty laws that prevents the import of products that are not available from domestic sources. Under the present law, there is no procedure that permits the temporary suspension of antidumping or countervailing duties for narrowly defined products that cannot be supplied by the domestic industry.

The AWPA is a very active participant in the Temporary Duty Suspension Group, which is a coalition of many industries that support the need for this important legislation. Comments submitted by the Temporary Duty Suspension Group to the Ways and Means Committee thoroughly describe the intentions of HR 2822 and address the misunderstandings and concerns expressed by opponents of this legislation. We have not reiterated those points in these comments, but rather have focused on direct wire industry experiences that effectively illustrate the need for HR 2822 and have provided examples for the illustration of the ability to administer this provision, should it become part of US trade law. The AWPA fully supports and endorses the comments of the Temporary Duty Suspension Group.

Antidumping and Countervailing Duty Laws

HR 2822 is not an attempt to weaken the antidumping and countervailing duty laws. On the contrary, the AWPAs has long supported the rigorous enforcement of US trade laws. Its members have used these laws in order to respond to unfairly traded or subsidized imports which have caused serious economic harm to the wire and wire products industry. Moreover, AWPAs members source raw material primarily from US manufacturers of steel wire rod. The AWPAs active members have worked closely with the domestic rod industry – now composed entirely of world-class and efficient mini-mills – to develop and expand the availability of American-made wire rod.

Further, the Temporary Duty Suspension Act will not obstruct the effective and rigorous administration of the current antidumping and countervailing duty laws. The Act can be invoked only if the specific product is not available from US producers. There is no injury to these domestic suppliers if they cannot provide the needed product to their customers in the US market. Therefore, the Temporary Duty Suspension Act does not weaken or undermine the remedies which are available under current antidumping and countervailing duty laws.

US Wire Industry Experience Illustrating the Necessity for Temporary Duty Suspension Procedure

The member companies of the AWPAs which manufacture wire and wire products have had considerable experience with the unintended effect of antidumping and countervailing duty proceedings on the availability of certain types of wire rod. AWPAs members also have experience with both the unintended effect of dumping petitions on wire rod supply, and with the administration of the short supply procedure during the "VRA" program.

During the antidumping investigations of carbon steel wire rod in 1993–94, the imposition of preliminary dumping duties prevented US manufacturers of steel wire and wire products from obtaining certain types of wire rod that were not available from domestic producers. In addition, the US market experienced severe shortages of even basic types of wire rod. Rod producers put their customers on allocation, canceled orders and postponed deliveries. The unavailability of wire rod threatened severe economic harm to a vigorous and profitable US wire industry, and it encouraged foreign competitors to target the US market for steel wire and wire products. Although the US International Trade Commission eventually made findings of no injury and terminated most of these investigations, this experience demonstrates the necessity for a mechanism to provide temporary relief when domestic consuming industries cannot obtain essential raw materials from sources in the United States.

Further, the petitioners in these carbon steel rod investigations amended the scope of their complaints to exclude some types of wire rod which were not available from producers in the United States. However, they did so only while pressuring those wire manufacturers, whose future depended upon the availability of such wire rod, to agree not to oppose the antidumping cases in general. This underscores the need for the Temporary Duty Suspension Act, which would give an independent and impartial governmental agency – in this case, the US Department of Commerce – the authority to make such decisions. The future of the domestic industry should not be held hostage to the tactical objectives of petitioners in antidumping and countervailing duty cases. Surely, it is in the commercial interest of all parties – including petitioners – that decisions relating to the domestic availability of needed products be made on

the basis of the facts and in accordance with established administrative procedures. In fact, the largest US rod producer, who was a petitioner in this case, has expressed support for an amendment to the antidumping and countervailing duty laws which "would provide authority for the Department of Commerce to grant 'short supply' authorization when a product is not produced domestically."

There are currently antidumping duties imposed on stainless wire rod from Brazil, India and France, and, there are only three domestic producers of stainless rod. These three mills are unable to supply the needs of all of the US stainless redrawers. Additionally, two of these three mills also make wire and compete in the wire market against other independent redrawers. This market structure has a unique impact on the supply of rod. Under certain market conditions, rod mills may choose to manufacture more wire, consuming their own rod production. This further limits the amount of rod available to the US redrawers. When the rod industry chooses wire production over rod sales, US wire manufacturers must have the ability to source on the global market.

When US mills make a profitable business decision to consume rather than sell rod, they cannot be harmed by the imports of rod. The US government should have the ability to waive duties for US wire producers who must have these raw materials to continue production, sales and the employment of our US workers and our customers' workers. Continued duties only provide importers of wire and wire products with an unfair trade advantage. The future of our industry should not be left to the tactical objectives of petitioners.

Precedent for and Administrability of a Temporary Duty Suspension Procedure

The members of the AWPAA have also had experience with the administration of a program which successfully dealt with the non-availability of certain types of steel products from domestic producers. During the steel Voluntary Restraint Agreement program, stainless steel wire drawers were able to obtain special licenses from the US Department of Commerce for rod products which were not available from domestic mills. For six consecutive calendar quarters, AWPAA members requested and obtained special licenses to import specific grades of stainless steel wire rod which were not available from domestic producers. In fact, domestic producers of stainless steel wire rod certified to the US Department of Commerce that such rod was not available in the US market, in sufficient quantities to meet domestic demand.

Further, it was the experience of the AWPAA that the US Department of Commerce was able to make these determinations, in each instance, in a prompt and fair manner without placing an undue burden on its resources.

CONCLUSION

The AWPAA respectfully requests the members of this Committee to support the Temporary Duty Suspension Act. This Act will remedy an unintended but harmful effect of the antidumping and countervailing duty laws which prevents the importation of products which are not otherwise available from domestic producers. The Act will not weaken the antidumping and countervailing duty laws or cause harm to the US industries that seek relief from unfairly traded and subsidized imports. Rather, the Act provides a limited procedure which can be invoked only in those exceptional circumstances when a specific product is not available from domestic producers. In this way, the Act enables downstream manufacturers to obtain needed raw materials so that they can maintain their

operations and compete successfully with foreign suppliers of the downstream product.

The member companies of the AWWA are concerned that the Congress and the House Ways and Means Committee get the full picture of the US Steel Industry, today, as you address the trade policy initiatives that affect this industry. There are many voices to consider. The decisions you make regarding trade policy should be made in light of the health and well-being of all the companies and employees that make-up today's steel industry.



BERG STEEL PIPE CORP.

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May 7, 1996

Mr. Phillip D. Moseley, Chief of Staff
Committee on Ways and Means
U.S. House of Representatives
1102 Longworth House Office Building
Washington, D.C. 20515

Re: Follow-up Comments on April 23, 1996
Hearing

Dear Mr. Moseley:

Berg Steel Pipe Corp. ("Berg") transmits this letter in order to clarify Berg's position on ultrasonic testing of steel plate discussed at the Trade Subcommittee hearing on April 23, 1996 on antidumping regulations. Berg's comments on the interim regulations of the Treasury Department are also included.

At the April 23rd hearing, the point was raised that certain products that are not available from domestic sources are subject to antidumping and countervailing duties and that this harms downstream U.S. industries unnecessarily. As an example of a product that is not available domestically, Ken Dorland of Enron Corporation cited the fact that full-body ultrasonic testing of steel plate is not available from domestic plate mills. Later in the hearing, Mr. Grow of Geneva Steel (and Chairman of the AISI) made a statement confirming that no U.S. plate mill has this capability, but suggesting that pipe manufacturers such as Berg could practically test pipes ultrasonically. Berg Steel wants to ensure that the Subcommittee is fully informed on this issue.

When a pipeline company orders pipe, its requirements can and often do include full-body ultrasonic testing of each plate that will be installed in the project. This requirement is usually indicated by referring to a testing standard developed by the American Society for Testing and Materials ("ASTM"). ASTM A 435/A 435M-90 and A 578/A 578M-92 contain the usual standards referenced for testing in this area; in each instance, the requirement is for the testing of plates.

In addition, it is totally impractical to wait to test plate until after it is made into pipe. As Berg has no plate mill, it must purchase all its plate from an outside supplier. If plate is not tested until it has been made into pipe, there is a

considerable risk that unusable pipe will be made, and the considerable expense of transporting plate and producing it into pipe would have been needlessly undertaken.

Berg's largest plate supplier understands that they, not Berg, must make provision for ultrasonic testing of plates as a commercial necessity. To suggest that Berg could somehow use domestic plate by investing several million dollars in ultrasonic testing equipment at the pipe mill completely ignores the practical nature of the problem.

While no U.S. supplier has installed "in-line" ultrasonic testing equipment ("in-line" refers to the testing of every plate during the production process), this is the superior method of conducting these tests. At least one mill in Canada, plus the mills in Europe and Japan that manufacture plate for line pipe have in-line ultrasonic testing. The U.S. producers are, quite simply, behind in this area, and use of the ultrasonic testing requirement will increase in the future. Until the U.S. industry is able to provide this product, temporary suspension of antidumping and countervailing duties for plate that is ultrasonically tested for use in pipelines will be a necessity.

Berg is concerned that, even if the industry should agree to revoke the antidumping and countervailing duty orders on ultrasonically tested plate, this will put Berg at a long-term disadvantage because it will weaken the pressure on the domestic industry to install ultrasonic testing equipment at U.S. plate mills. This points out the urgent need for authority for the Commerce Department to permit temporary suspension of duties.

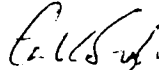
Berg also wishes to point out that there are other plate properties that are not available from domestic producers. Wide plate (for pipe 48" or over in outside diameter), reduced chemistry for better on-site weldability, special chemistry to protect against hydrogen-induced cracking of the pipe (a problem in "sour" gas) and some mechanical properties for Arctic applications (such as Alaska), are further examples.

Berg also wishes to bring to the Committee's attention another issue concerning administration of the antidumping laws. The U.S. Treasury Department recently issued interim regulations to implement certain duty-deferral provisions in the North American Free Trade Agreement Implementation Act. These regulations, published at 61 Fed. Reg. 2908 (January 30, 1996), assess antidumping (and countervailing) duties on goods made from merchandise subject to NAFTA drawback, at the time such goods are exported to Canada (beginning January 1, 1996), or to Mexico (beginning January 1, 2001) under a "duty deferral" program such as the foreign-trade zones program. Berg submits there is no legal authority for the assessment of antidumping and countervailing duties on this exported merchandise. Moreover, the interim regulations also exceed the Treasury

Department's statutory authority by subjecting the exported merchandise to the merchandise processing fee established by 19 U.S.C. § 58c(a)(9). Berg further notes that these regulations were issued retroactively and without opportunity for affected parties, such as Berg, to comment prior to the time the regulations went into effect. For the Committee's reference, Berg is submitting as Attachment A, a copy of the comments it submitted to the U.S. Customs Service on the interim regulations in question. That submission discusses the reasons why the interim regulations are contrary to existing law and urges that the Customs Service make appropriate corrections.

Berg Steel Pipe Corp. appreciates the opportunity to provide these views to the Trade Subcommittee.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'C. G. Seigler', written in a cursive style.

Carl G. Seigler
Vice President

HOGAN & HARTSON
LLP

ATTACHMENT A

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April 1, 1996

BY HAND DELIVERY

Mr. Harold Singer
Chief, Regulations Branch
U.S. Customs Service
Franklin Court
1301 Constitution Avenue, N.W.
Washington, D.C. 20229

Re: Comments on Interim Regulations Implementing the Duty-Deferral Program Provisions of the North American Free Trade Agreement ("NAFTA")—61 Fed. Reg. 2908 (Jan. 30, 1996)

Dear Mr. Singer:

This submission on behalf of Berg Steel Pipe Corp. ("Berg"), of Panama City, Florida, responds to publication of interim regulations of the Department of the Treasury ("Treasury Department," or "Treasury") pertaining to NAFTA duty deferral programs. *North American Free Trade Agreement (NAFTA)—Implementation of Duty Deferral Program Provisions*, 61 Fed. Reg. 2908 (Jan. 30, 1996) ("interim regulations"). On behalf of Berg, we appreciate the opportunity to provide its views on the interim regulations.

Berg is one of three major domestic producers of large diameter steel pipe for oil and gas pipelines and offshore platforms. Berg employs more than 200 people in its manufacturing facility in Panama City, Florida, and its sales office in Houston, Texas. Berg's manufacturing operations are conducted within Foreign Trade Zone No. 65, located in Panama City, Florida, using foreign-trade zone procedures. The capacity of the Berg manufacturing facility is approximately 250,000 tons of pipe per year.

As an exporter of its steel pipe products to NAFTA countries and a user of foreign-trade zone procedures, Berg has serious concerns regarding certain provisions of the interim regulations that negatively affect Berg and similarly-situated U.S. exporters. Specifically, the interim regulations are legally deficient in two critical respects:

1. The interim regulations provide for assessment and collection of antidumping and countervailing duties on merchandise made from goods subject to NAFTA drawback under a duty deferral program (including the foreign-trade zones program) that is exported to a NAFTA party, even though Congress neither directed nor authorized Treasury to assess or collect these duties.
2. The interim regulations provide for collection of the Merchandise Processing Fee on such merchandise; here also, Congress has provided no direction or authority for this collection.

The interim regulations not only are contrary to law, but also are harmful to the interests of U.S. exporters such as Berg. Foreign producers of goods competing with U.S. exporters for the Canadian market are now receiving a significant competitive advantage over Berg and other U.S. exporters as a result of Treasury's collection of the antidumping and countervailing duties at issue. These foreign producers are now able to market their competing goods in Canada without incurring liability for U.S. antidumping and countervailing duties on the materials and components they use in production. The same competitive disadvantage would adversely affect U.S. companies exporting to Mexico beginning January 1, 2001. As now formulated, the interim regulations encourage U.S. businesses to move offshore—a result clearly not intended by the NAFTA or the U.S.

Congress. We believe Treasury should act at once to correct this legal deficiency and thereby avoid the commercial harm that is now being imposed on affected U.S. exporters.

The interim regulations benefit Canadian and Mexican manufacturers at the expense of U.S. manufacturers with respect to the collection of the Merchandise Processing Fee. Products of Canada exported to the United States, if satisfying the NAFTA preferential rules of origin, are exempt from this Fee.^{1/} Similarly, imports of NAFTA-originating goods of Mexico receive preferential treatment with respect to the Fee--such goods may not be charged a fee in excess of that in effect on December 31, 1993 (*i.e.*, 0.19 percent *ad valorem* as opposed to the current 0.21 percent) and will be totally exempt from the Fee on and after June 29, 1999.^{2/} Thus, in unlawfully collecting the Fee on exports of goods made by U.S. manufacturers, the Treasury Department has treated U.S. exporters less favorably than Canadian exporters and Mexican exporters are treated under the NAFTA as implemented in U.S. law.

In view of the disadvantages to U.S. manufacturers that result, Treasury's decision to collect the antidumping/countervailing duties and Merchandise Processing Fee in the situations described would require a compelling legal justification. However, no justification of any kind is presented in the preamble to the interim regulations, and we believe no such legal justification is possible.

Berg also objects to the manner in which the two measures at issue were imposed. Treasury imposed these measures *retroactively*, a full month *after* the effective date, affording affected exporters such as Berg no notice or opportunity to object through public comment procedures prior to imposition. The Federal Register notice attempts to justify dispensing with the notice and comment and delayed effective date requirements of the Administrative Procedure Act (5 U.S.C. § 553) by citing the "foreign affairs" exception of 5 U.S.C. 553(a) as it applies to the NAFTA.^{3/}

Treasury's reliance on the foreign affairs exception is misplaced. Section 553(a)(1) of Title 5 provides an exception from the notice and comment and delayed effective date requirements of the Administrative Procedure Act only "*to the extent* there is involved a foreign affairs function of the United States."^{4/} Even assuming, *arguendo*, that the statutory exception has some applicability to the interim regulations, it does not apply, under the plain meaning of 5 U.S.C. § 553(a)(1), to the provisions in the interim regulations that assess antidumping and countervailing duties and the Merchandise Processing Fee. Neither the NAFTA nor the NAFTA Implementation Act directs Treasury to effectuate these assessments. Even had Congress granted Treasury discretionary authority to make these collections (which it has not), the notice of January 30, 1996, in having effects independent of the statute it seeks to implement, still would constitute a "legislative rule" to which the rulemaking requirements of the Administrative Procedure Act apply. See *American Frozen Food Institute, Inc. v. United States*, 855 F. Supp. 388, 395-396 (Ct. Int'l Trade 1994) and cases cited therein.

Finally, retroactivity is strongly disfavored in the law, for reasons of fundamental fairness, including the interests of parties who must rely on existing law in arranging their transactions and conduct.^{5/} Retroactivity, which can alter the legal consequences of past decisions made under existing law, is all the more harmful where, as here, Treasury gave no indication that it would collect the antidumping/countervailing

^{1/} 19 U.S.C. § 58c(b)(10).

^{2/} *Id.* Congress effected the increase in the statutory maximum for the merchandise processing fee from 0.19 percent *ad valorem* to 0.21 percent *ad valorem* in 1994 when it enacted Section 612 of the Uruguay Round Agreements Act, Pub. L. 103-465.

^{3/} 61 Fed. Reg. at 2910

^{4/} 5 U.S.C. § 553(a)(1) (emphasis added).

^{5/} See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219, 109 S.Ct. 468, 102 L.Ed. 2d 493 (1988).

duties and processing fees during the period of more than three years that occurred between passage of the NAFTA Implementation Act (enacted December 8, 1993) and issuance of the interim regulations last January 30, and even announced, on September 29, 1995, that it *would not* collect these very same duties and fees. ^{6/}

In summary, the interim regulations were issued under procedures contrary to law and contain unlawful substantive provisions that prejudice U.S. manufacturers such as Berg relative to producers in other countries. Berg urges immediate correction of these serious flaws. The legal deficiencies pertaining to the antidumping/countervailing duty and Merchandise Processing Fee collections, respectively, are discussed below.

A. U.S. Law Provides No Authority for Collection of Antidumping and Countervailing Duties on Exports to Canada and Mexico of Merchandise Made from Goods Subject to NAFTA Drawback

Under § 181.53(a)(2) of the interim regulations, merchandise made in a foreign trade zone from goods subject to NAFTA drawback and exported to Canada, (or, beginning in 2001, to Mexico) is treated as if it were an entry for consumption and is assessed antidumping and countervailing duties under § 181.53(a)(2)(i)(C). This provision is directly contrary to the antidumping and countervailing duty laws as enacted by Congress and interpreted by the courts. ^{7/}

Under U.S. law, antidumping and countervailing duties are assessed and collected *only* on merchandise that is entered for consumption *in the Customs Territory of the United States*. ^{8/} The Court of International Trade ^{9/} and the Commerce Department ^{10/} consistently have held that merchandise admitted into a foreign-trade zone is not subject to antidumping and countervailing duties unless and until it is entered for consumption in the U.S. Customs Territory. Because merchandise admitted into a foreign-trade zone and then exported to a NAFTA party never enters the U.S. Customs

^{6/} U.S. Customs Service, *NAFTA Duty Deferral* (electronic bulletin board notice) (Sept. 29, 1995) at 4.

^{7/} Although this letter analyzes this issue with respect to exports from foreign-trade zones, the principles discussed also are applicable to exports from the United States under the other duty deferral programs.

^{8/} See, e.g., the following sections of the antidumping and countervailing duty laws: 19 U.S.C. § 1671b(d)(2) and 19 U.S.C. § 1673b(d)(2) (liquidation of entries for consumption are suspended under countervailing and antidumping duty law, respectively), 19 U.S.C. § 1671e(a) and § 1673e(a) (deposit of estimated countervailing and antidumping duties, respectively, pending liquidation of entries of merchandise, to occur at the same time as normal customs duties on that merchandise are deposited); 19 U.S.C. § 1671e(b) and § 1673e(b) (imposing countervailing and antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption).

^{9/} *Torrington Co. v. United States*, 881 F. Supp. 622, 646 (Ct. Int'l Trade 1995); *Timken Co. v. United States*, 865 F. Supp. 881, 888 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 865 F. Supp. 850, 856 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 862 F. Supp. 413, 420 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 858 F. Supp. 206, 214 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 852 F. Supp. 1122, 1132 (Ct. Int'l Trade 1994); *Torrington Co. v. United States*, 826 F. Supp. 492, 494 (Ct. Int'l Trade 1993); *Torrington Co. v. United States*, 823 F. Supp. 945, 948 (Ct. Int'l Trade 1993); *Torrington Co. v. United States*, 818 F. Supp. 1563, 1573 (Ct. Int'l Trade 1993), *appeal pending* Nos. 95-1210 and 95-1211 (Fed. Cir. Dec. 7, 1994) (. . . "there is no reason to believe that the use of the term entry in the antidumping duty statute refers to anything other than formal entry of merchandise into the U.S. Customs territory" (emphasis added)).

^{10/} *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan: Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 65,228 (Dec. 16, 1991) ("[O]ur understanding of the term 'entry' in the antidumping law is that it unambiguously refers to release of merchandise into the customs territory of the United States"); *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof from Japan: Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 41,506 (Aug. 21, 1991); *Antifriction Bearings from the Federal Republic of Germany, et al.: Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,703 (July 11, 1991).

Territory for consumption in the United States, antidumping and countervailing duties lawfully may be neither assessed nor collected.

The NAFTA Implementation Act does not create an exception to this statutory principle. Pursuant to NAFTA Article 303(3) as implemented by Section 203(b)(5) of the NAFTA Implementation Act, "a duty" is to be assessed on foreign-trade zone exports to Canada and Mexico of merchandise made from goods subject to NAFTA drawback, but the statutory provision makes no mention of antidumping and countervailing duties. Moreover, nothing in the legislative history (including specifically, the Statement of Administrative Action accompanying the NAFTA Implementation Act as submitted to the Congress) states or even suggests that antidumping duties and countervailing duties are to be assessed in addition to ordinary customs duties under this special procedure. Congress cannot be presumed to have intended to create an exception to a statutory principle where, as here, the draft legislation and supporting materials submitted to it for "fast track" consideration fail to even mention any such exception. Had Congress intended the result effected by the interim regulations, it would have amended the antidumping and countervailing duty laws to accomplish it.

It is also noteworthy that the Treasury Department does not have authority over the imposition of antidumping and countervailing duty. The interim regulations are not valid because they were not issued by the U.S. Department of Commerce, which has full authority in this area. Here also, had Congress intended to delegate to the Treasury Department regulatory responsibility in this area, it would have provided so explicitly.

Treasury apparently presumes that antidumping and countervailing duties should be added to the special duty collected on exports from foreign-trade zones under Section 203(b)(5) of the NAFTA Implementation Act to effectuate some intent it attributes to the NAFTA. However, the NAFTA does not require the assessment or collection of antidumping/countervailing duties on the merchandise at issue. To the contrary, the NAFTA explicitly excludes antidumping and countervailing duties from the ordinary customs duties assessed on exports from foreign-trade zones under the special duty collection procedure. ^{11/}

B. The Treasury Department Has No Authority to Assess the Merchandise Processing Fee on the Merchandise at Issue

The Merchandise Processing Fee (the "MPF," or the "Fee") is imposed, with certain exceptions, on merchandise formally entered or released from warehouse for consumption in the Customs Territory of the United States. The interim regulations are *ultra vires* in assessing and collecting the Fee on merchandise withdrawn from a foreign-trade zone for export to Canada and (beginning 2001) to Mexico.

Specifically, Congress imposed the Fee (now fixed by statute at a maximum of 0.21 percent *ad valorem*) on "merchandise that is formally entered or released during any fiscal year." ^{12/} The term "entered or released" is defined by statute to apply only to three specific situations pertaining to merchandise formally entered for consumption, or withdrawn from warehouse for consumption, in the U.S. Customs Territory. ^{13/} Therefore,

^{11/} NAFTA Article 318 expressly excludes antidumping and countervailing duties from the definition of "customs duties" as that term is used in Article 303(3). Article 303(2)(a) also refers to antidumping and countervailing duties but pertains only to waiver or reduction of duties "applied pursuant to a Party's domestic law." Nothing in NAFTA Article 303 requires the United States to amend its antidumping and countervailing duty laws to initiate the collection of antidumping and countervailing duties on the subject NAFTA exports from foreign-trade zones.

^{12/} 19 U.S.C. § 58c(a)(9)(A). The Fee was imposed by Congress in section 8101 of the Omnibus Budget Reconciliation Act of 1986, P.L. 99-509 ("OBRA"), which amended the general Customs user fee provisions imposed by Section 13031 of the Consolidated Omnibus Reconciliation Act of 1985, P.L. 99-272.

^{13/} Merchandise "entered or released" is defined by statute as merchandise that is "permitted or released under section 1448(b) of this title" [referring to perishable goods imported into the United States and released into the Customs Territory from Customs custody under permit for immediate

by statute, merchandise admitted to a foreign-trade zone and withdrawn in foreign status from the zone for export is not subject to the MPF

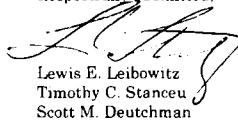
Pertinent legislative history confirms that the Fee does not apply to "merchandise which does not formally *enter U.S. commerce for consumption*." ^{14/} Congress clearly did *not* intend to assess the Fee on exported merchandise, intending instead that in return for paying the fee the "*importing community* has a right to expect the Customs Service to be adequately staffed and to provide its services in an expeditious fashion." ^{15/}

Additionally, nothing in the NAFTA Implementation Act (which the interim regulations are intended to effectuate) provides any authority for the collection of the MPF on exports of merchandise made from goods subject to NAFTA drawback that is exported under foreign-trade zone procedures (or other duty deferral procedures). Were it to so provide, it would be inconsistent with the NAFTA, under which the special duty collected under Article 303(3) is expressly defined to exclude "any . . . fee or other charge in connection with importation commensurate with the cost of services rendered."

For the aforementioned reasons, the Treasury Department's assessment and collection of antidumping and countervailing duties and the MPF under the interim regulations are unlawful and highly prejudicial to U.S. exporters such as Berg. Berg respectfully requests that the Treasury Department act promptly to correct these legal deficiencies, which are causing injury to affected U.S. manufacturers.

If we can be of any further assistance, please do not hesitate to contact the undersigned.

Respectfully submitted,



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delivery], "entered or released from customs custody under section 1484(A)(1)(A) of this title" [referring to imported merchandise formally entered for consumption in the Customs Territory by an importer of record] or "withdrawn from warehouse for consumption." 19 U.S.C. § 58c(b)(8)(E).

^{14/} H.R. Conf. Rep. 99-1012, 99th Cong. 2d Sess. 388 (1986), *reprinted in* 1986 U.S.C.A.N. 3607, 4033 (emphasis added).

^{15/} *Id.* at 4034

**COMMENTS OF THE COMMITTEE ON PIPE AND TUBE IMPORTS (CPTI)
AND WEIRTON STEEL CORPORATION
ON THE PROPOSED REGULATIONS OF THE DEPARTMENT OF COMMERCE**

In response to the Committee's request for written comment on the proposed regulations issued by the Department of Commerce, Schagrin Associates submit these comments on behalf of the Committee on Pipe and Tube Imports (CPTI) and on behalf of Weirton Steel Corporation.

1. Deduction from export price for reimbursement of countervailing duties.

Current Commerce regulations provide for a deduction from the U.S. price (now export price) for the amount of any antidumping duty which the producer or reseller pays directly on behalf of the importer or reimburses to the importer. 19 C.F.R. §353.26. In the new legislation, Congress specifically approved this regulation and stated that it "expects that Commerce will continue to make this deduction." Sen. Rep. No. 412, 103d Cong. 2d Sess. 64 (1994) (hereinafter "SR"). Congress went on to note that "there is no reason to differentiate between reimbursement of antidumping duties and the reimbursement of countervailing duties in calculating export or constructed export price in antidumping proceedings." SR 64. Thus, the legislative history directs Commerce to "amend its regulations to require a reduction to export or constructed export price for countervailing duties directly paid or reimbursed to importers." *Id.*

The new regulatory language prevents importers from evading payment of duties designed to remedy unfair pricing. Rejection of this regulatory change would open a huge loophole in the law and deny relief to the domestic industry where the subject merchandise is covered by both antidumping and countervailing duty orders.

Under section 772(c)(1)(C), the Department increases the price used to calculate export price (or constructed export price) by the amount of any countervailing duty imposed to offset an export subsidy. This adjustment prevents double counting of compensating duties. If the countervailing duty is reimbursed, the importer evades payment of both the countervailing duty and the antidumping duty (by reason of the section 772(c)(1)(C) adjustment). Consequently the domestic industry receives no relief either for the illegal subsidization or for the less-than-fair-value pricing. U.S. law cannot be interpreted to provide greater relief where an antidumping duty order is in place than if both antidumping and countervailing duty orders cover the same merchandise.

2. Establishment of level of trade prior to investigation of qualification for a level of trade adjustment.

New section 773(a)(1)(B)(i) requires that Commerce establish normal value "to the extent practicable, at the same level of trade as the export price or constructed export price." The statute does not specifically define the criteria for determining whether differing levels of trade exist, but focuses on whether an adjustment is appropriate for situations involving comparisons at different levels of trade.

In the Uruguay Round implementing legislation, Congress did nothing to reject Commerce's current methodology of analyzing levels of trade in the context of the distribution chain for the subject merchandise. See Import Administration Policy Bulletin, Number 92/1 (July 29, 1992); *Certain Carbon and Alloy Steel Wire Rod from Canada*, 59 Fed. Reg. 18791, 18794 (1994). The House Committee report explained the "statutory scheme." First, Commerce is "to the extent practicable, establish normal value based on . . . sales at the same level of trade" and may not make level of trade adjustments if such comparisons are available. H. Rep. No. 826, 103d Cong., 2d Sess. 85-86 (1994) (hereinafter "HR"). "Second, when sales in the United States and foreign markets cannot be compared at the same level of trade, an adjustment to normal value may be appropriate." HR 86. An adjustment for differences in level of trade is permissible only if it involves the performance of different selling activities and is demonstrated to affect price comparability (based on a pattern of consistent price differences between sales at different levels

of trade in the country in which normal value is determined.) Section 773(a)(7)(A)(i) & (ii).

Similarly, the Senate report notes the expectation that different levels of trade could exist yet the distinctions in selling practices and price comparability might not be sufficient to warrant a level of trade adjustment. The report states: "In order to qualify for such a level of trade adjustment, the differences in level of trade must (1) involve the performance of different selling activities and (2) be demonstrated to affect price comparability. . . ." SR 71.

In stark contrast to the statutory scheme and its past practice, the Department states "the only test identified in the statute for the legitimacy of the claimed levels of trade is the activity of the seller." 61 Fed. Reg. 7348. The Department's sole reliance on an adjustment provision criterion to define level of trade directly conflicts with the legislative history and leads Commerce into an administrative and interpretative morass. Indeed, the Department's explanation of its proposal acknowledges the problems of defining level of trade in a way which ignores the distribution chain. The Department states "that prices within a single level of trade, defined by seller function, can be affected by the class of customers, and the Department will make every effort to compare sales at the same level of trade and to the same class of customer." 61 Fed. Reg. 7348. But the statute does not embody this concept in the adjustment provision. Rather, where a company exists in the distribution chain is inherent in the determination of existence of different levels of trade prior to consideration of whether an adjustment is warranted.

The fallacy of the Department's approach was recently made apparent when the Department ignored all identified customer classes and channels of distribution and focused exclusively on four groups of selling functions to identify levels of trade. *Pasta from Italy*, 61 Fed. Reg. 1344, 1347 (1996) (preliminary). The Department coded each sale to reflect the four selling functions, thereby creating the potential for 16 different levels of trade. Such a result does not reflect commercial reality and was not contemplated by Congress.

The Department's approach in the proposed regulations is inappropriately result driven. The Department justifies its failure to require establishment of different levels of trade before considering a LOT adjustment by arguing "that the effect of adopting such a criterion would be to curtail severely the possibility of adjusting for significant differences in seller functions, either with a level of trade adjustment or the CEP offset." 61 Fed. Reg. 7348. The Department may not redraft the statute so that the Department can "grant claims for level of trade adjustments more frequently than it did in the past." 61 Fed. Reg. 7346. The Department's policy bias in favor of more LOT adjustments is not consistent with the warning from Congress that level of trade adjustments were "susceptible to manipulation (HR 86) and must be "investigated carefully" (SR 71).

The Department's unlawful bias toward grant of level of trade adjustments is also revealed in the explanatory statement that "the regulations specify that the Department will in all instances analyze the level of trade of the sales in the United States and the comparison market, and where appropriate, will increase or decrease normal value to effect a fair comparison." To the contrary, a level of trade adjustment must be justified by comprehensive documentation from the respondent whether or not the Department believes the comparison of sales at differing levels of trade is fair. Congress emphasized that the burden is on respondent to establish an adjustment to decrease normal value. HR 86. Moreover, new section 773(a)(7)(A) permits allowances for differences in levels of trade only after all other appropriate adjustments have been made. HR 86, SR 70-71. The Department's favoritism of level of trade adjustments leads it to the exact opposite position when it notes that "where the Department makes a level of trade adjustment, the Department will not make an adjustment for differences in quantities unless the effect on price comparability of the quantity differences can be isolated from the effect of the level of trade difference." 61 Fed. Reg. 7346.

The Department should revise its regulations to indicate that the existence of differing levels of trade will be analyzed in the context of the distribution chain for the merchandise. The regulations should also make clear that, while the existence of differences in selling activities is a prerequisite to establishing a different levels of trade, such differences must be significant and will be evaluated in terms of commercial reality.

3. Examination of level of trade for constructed export price (CEP) sales based on a constructed CEP level of trade.

The proposed regulations provide that "in the case of export price and normal value, the Secretary will identify the level of trade based on the starting price" but that "in the case of constructed export price, the Secretary will identify the level of trade based on the price after the deduction of expenses and profit under section 772(d) of the Act." Proposed §351.412(b)(1) & (2). Thus, as the Department's explanation specifically states, for CEP sales, level of trade will be analyzed at "the constructed level of trade of the price after the deduction of U.S. selling expenses and profit." 61 Fed. Reg. at 7347. The Department justifies its proposed approach by stating that:

If the starting price is used for all U.S. sales, the Department's ability to make meaningful comparisons at the same level of trade (or appropriate adjustments for differences in levels of trade) would be severely undermined in cases involving CEP sales. As noted by other commentators, using the starting price to determine the level of trade of both types of U.S. sales would result in a finding of different levels of trade for an EP and a CEP sale adjusted to a price that reflected the same selling functions.

61 Fed. Reg. at 7347. Creation of a constructed CEP level of trade is both unjustified and contrary to law.

The Department position is unjustified because it fails to establish that, if Commerce does not deduct U.S. selling expenses from the CEP price, then the EP and CEP sales would be found to be at different levels of trade. If sales to an unaffiliated U.S. purchaser are made by both the foreign producer directly and by the foreign producer's U.S. affiliate, the services and functions performed may be the same in both instances. Moreover, whether sales are made directly or through an affiliate may have no material effect on the chain of distribution. In such situations, the EP and CEP starting price would be at the same level of trade. Only in situations where the CEP sales reflect additional functions undertaken by the U.S. affiliate (such as warehousing, advertising, or technical service), that are not undertaken by the foreign manufacturer for EP sales, might the CEP sales be considered as a separate level of trade.

The Department's proposed constructed CEP level of trade establishes a framework whereby sales that are made involving the same sale functions and occurring at the same commercial level of trade in both the U.S. and home market will not be regarded as the same level of trade. For example, in a recent investigation, the selling functions involved in EP and CEP sales were largely the same, regardless of whether they were undertaken by the manufacturer or by the U.S. affiliate. But when Commerce adjusted the CEP to eliminate all U.S. selling expenses, it found that the CEP was at a different and less advanced level than either the EP or normal value sale. As a result, a CEP offset was granted with respect to normal value sales even though no difference in level of trade existed in commercial reality and selling functions did not differ. *Stainless Steel Wire Rods from France*, 61 Fed. Reg. 8915 (March 6, 1996) (preliminary).

The same anomalous situation was also created in a recent administrative review where the respondent reported the same selling functions to customers in the U.S. and home markets. The Department stated that:

The level of trade of the U.S. sales is determined by the adjusted CEP rather than the starting price. The adjusted CEP sales do not reflect the selling function of end users/converters, such as customer sales contacts, technical service, and inventory maintenance. The home market sales reflect these additional selling functions performed for direct sales to end users/converters. Therefore, the selling function performed for CEP sales are sufficiently different than for home market sales to consider CEP sales and home market sales to be at different levels of trade.

Aramid Fiber Formed of Ply Para-Phenylene Terephthalamide from The Netherlands, 61 Fed. Reg. 15766, 15768 (April 9, 1996) (preliminary).

In both cases, if the Department had used the starting price of the CEP sales for comparison, it would have found that sales were at the same level of trade as the home market sale and made a proper comparison without a level of trade adjustment or a CEP offset. It is only because the agency adjusted CEP by deducting selling expenses that the sales were no longer at the same level of trade. Rather than placing CEP sales on a par with EP or similar normal value sales, the Department's proposal ensures that the CEP price will be at a different and less advanced level of trade from EP or normal value.

These recent determinations demonstrate that the Department's approach is contrary to the statute. First, the statute requires that Commerce establish normal value "to the extent practicable, at the same level of trade as the export price or constructed export price." Section 773(a)(1)(B)(i); see SR 71. The statute does not state that normal value is to be established at the same level of trade as a constructed CEP level of trade. Second, a constructed CEP level of trade necessitates a level of trade adjustment to permit a proper comparison with normal value. Commerce may not make level of trade adjustments if comparisons at the same level of trade are available. HR 85-86. Similarly, in situations where a level of trade adjustment cannot be justified, the proposed constructed CEP level of trade makes application of the CEP offset a routine matter. The Statement of Administrative Action states that the law was amended so the CEP offset would not be automatic but would be used in only unusual situations where different levels of trade exist but the data of record do not permit an adjustment. SAA 830-831; see also SR 71 ("Neither the level of trade adjustment nor the constructed export price offset should be made where Commerce is able to compare sales at the same level of trade.").

Finally, the Department may not redraft the statute merely so it can grant level of trade adjustments more readily than it did in the past. Rather, if CEP sales involve substantial, additional selling functions and expenses as compared with EP sales or with normal value sale, these disparate functions should be taken into account in comparing the prices of the sales for level of trade purposes and not netted out even before the comparison is attempted.

4. Suspension of liquidation at time of initiation of anticircumvention investigations.

The unfair trade laws of the United States are designed to give relief to U.S. producers suffering the injurious effects of unfair competition. *Brother Industries (USA) Inc. v. United States*, 16 CIT 1109, 1110 (1992). "Commerce, as the administrative agency, is entrusted to safeguard domestic industries from unfair trading practices by foreign manufacturers." *NTN Bearing Corp. of America v. United States*, 14 CIT 623, 627, 747 F. Supp. 726, 731 (1990). The anticircumvention provisions play an essential role in the statutory antidumping scheme. In directly addressing circumvention with new legislation in 1988, Congress was "concerned about the increasing instances in numerous product sectors of circumvention, diversion, and evasion of antidumping and countervailing duty orders." S. Rep. No. 71, 100th Cong., 1st Sess. 101 (1987). Companies were able to "evade an order by making slight changes to production or shipment of the merchandise destined for consumption in the United States." *Id.* Congress recognized that these "loopholes" had "undermined the effectiveness of remedies . . . and frustrated the purposes for which the laws were enacted." *Id.* Congress therefore developed a number of statutory remedies to combat circumvention. The Senate committee expressed its belief that "aggressive implementation of [the statutory provisions] by the Commerce Department [could] foreclose these practices." *Id.* Thus, the Court of International Trade has found that "Congress has attempted to thwart importers' circumvention strategies by enacting legislation intended to 'send a clear message to foreign producers and trading partners that we will actively seek to prevent circumvention of our trade laws . . .'" *NTN Bearing*, 14 CIT at 627.

Unfortunately, Commerce did not implement the circumvention statute in a fashion which reflected the strong Congressional concerns. Thus, in the context of amendments made by the Uruguay Round implementing legislation, Congress stated that the earlier circumvention provisions had "not proved effective in curbing circumvention of antidumping and countervailing duty orders." S. Rep. No. 412, 103d Cong., 2d Sess. 81 (1994). As the Statement of Administrative Action recognizes, the governing philosophy of Congressional action in 1994 was "improving [U.S.] ability to prevent circumvention." SAA 894.

Despite the clear messages from Congress to attack circumvention, Commerce continues to ignore Congressional intent. In its explanation of the proposed anticircumvention regulations, the Department rejected the argument that liquidation should be suspended at the time of initiation of an anticircumvention investigation. Commerce reasoned that such action "would punish unfairly parties who unknowingly circumvent an order." 61 Fed. Reg. 7322. Yet, in the next sentence of its explanation, the Department correctly states that "the statute does not require a finding of intent in order to make an affirmative circumvention determination." *Id.* Thus, the Department contradicts its own rationale for not suspending liquidation at the time of initiation of a circumvention investigation. Whether or not foreign producers are "knowingly" circumventing an order is of no moment. The primary statutory objective is prevention of circumvention, not protection of exporters who are circumventing an order but may not be knowingly doing so.

Commerce's further justification that suspension of liquidation of circumventing entries "would create tremendous business uncertainty and impose a heavy burden on the Department and on Customs" is similarly unavailing. 61 Fed. Reg. 7322. Permitting evasion of the law and denial of relief cannot be justified based on vague concerns of "business uncertainty." That the Department may find enforcement of the law burdensome is neither established or relevant.

Failure to suspend liquidation of merchandise under investigation at the time of initiation is most egregious with respect to section 781(c) investigations. Section 781(c) addresses situations where the merchandise being investigated originates in the subject country but has been altered in minor ways to ostensibly take it outside an order's description of subject merchandise. In the "minor alterations" provision, Congress created a "presumption" that such merchandise was within the scope of the order regardless of its tariff classification. S. Rep. No. 71 at 100. Commerce's proposed regulations and explanatory comments contravene the presumption of circumvention embodied in section 781(c). To implement section 781(c), Commerce must suspend liquidation of merchandise covered by a circumvention investigation effective the date of initiation.

5. Criteria for evaluation of circumvention under section 781(c).

To determine whether the merchandise is within the scope of an order based on section 781(c), the "minor alterations" anticircumvention provision, the Department must examine:

(1) the overall characteristics of the merchandise; (2) the expectations of the ultimate users; (3) the use of the merchandise; (4) the channels of marketing; and (5) the cost of any modification relative to the total value of the imported product. S. Rep. No. 71, at 100; see *Electrical Conductor Aluminum Redraw Rod from Venezuela*, 55 Fed. Reg. 3434 (February 1, 1990) (preliminary determination). Commerce's proposed regulations do not, but should, incorporate these evaluative criteria. The regulations should also state that the evaluative criteria will be applied in a "practical" manner and that circumvention relief will be afforded even where "the alterations to an article technically transform it into a differently designated article." S. Rep. No. 71, 100th Cong. 1st Sess. 101 (1987).

6. Weighing of evidence contain in a petition in pre-initiation stage of an antidumping or countervailing duty proceeding.

New sections 702(c)(1)(A)(i) and 732(c)(1)(A)(i) reflect prior requirements for an examination, based on readily available sources, of the accuracy and adequacy of evidence presented in a petition and largely codify existing Commerce practice. SR 34-35; SAA 861 citing S. Rep. 249, 96th Cong. 1st Sess. 47, 63 (1979); H.R. Rep. 317, 96th Cong. 1st Sess. 51, 59-60 (1979). The Department properly notes that the new standard is not a significant departure from past Department practice, yet states that it will reach conclusions respecting whether data is "aberrational" or "weak," even though the submitted data is supported by documentation. 61 Fed. Reg. 7313. This interpretation violates the statute.

If data is supported in a petition, such data should be adequate proof of the reasonableness of its accuracy sufficient that the Department should conclude the petition is not "clearly frivolous." H.R. Rep. 317, 96th Cong. 1st Sess. 51 (1979). Weighing of conflicting evidence

gathered by Commerce violates the statutory initiation standard. Rather, Commerce may consider readily available information on matters for which the petition must rely as conjecture or for which petition information is absent. However, even unsupported petition statements should be accepted at their face in the absence of readily available conflicting information.

The statute and legislative history do not envision an adversarial pre-initiation proceeding. Rather, Commerce should "advise and assist, to the degree practicable, the petitioner in formulating the [allegation] so that it meets statutory and regulatory requirements." H.R. Rep. 317, 96th Cong. 1st Sess. 51 (1979). The statutory and regulatory requirements are met by a supported petition allegation.

7. Existence of control sufficient for a finding that persons are affiliated.

The statutory definition of affiliated persons includes "any person who controls any other person and such other person." Section 771(33)(G). Moreover, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person." Section 771(33). A firm may be in a position to exercise restraint or direction, in the absence of any equity relationship, "through corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships in which the supplier or buyer becomes reliant upon the other." SAA 838.

The Department's proposed regulation provides for examination of the indicia of control such as corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships. Section 351.102(b). But the Department states that in analyzing control "business and economic reality suggest that these relationships must be significant and not easily replaced" and that it will "examine these indicia . . . to determine whether they are, in fact, evidence of control." 61 Fed. Reg. 7310. This formulation violates the statute, as soon thereafter acknowledged by the Department. The statute defines control "in terms of the ability to exercise restraint and direction." *Id.* at 7311 (emphasis in original). Thus, the existence of any of these conditions -- corporate or family groupings, franchises or joint venture agreements, debt financing, or close supplier relationships -- constitutes an ability to exercise control. These relationships are by their nature significant and not easily replaced. If a company being investigated cannot establish a mechanism which would prevent the exercise of the ability to control, the Department must find that statutory control exists. The Department's explanatory language in the final regulations should reflect this understanding.

The Department states that, with respect to control factor of the affiliated parties definition, it has rejected "presumptions" in the proposed regulations. Yet the Department also states that "temporary market power, created by variations in supply and demand conditions, would not suffice." 61 Fed. Reg. 7310. The Department's conclusion conflicts with the statute and is an unwarranted restriction on the reach of the control factor in the affiliated parties definition which. Disruptions in supply and demand could create an ability to control another company's market actions during an historically short but meaningfully long period in relation to the Department's investigation. Thus, temporary market power can be even more significant and the relationship less easily replaced during the relevant period than could longer-term market power.

The validity of addressing the impact of temporary, but significant control is particularly evident in the importance of defining affiliated parties in the context of the major input rule. (The legislative history specifically notes that the combination of new section 773(f)(3) and the expanded affiliated parties definition is intended to better address diversionary input dumping.) After noting that "affiliation is relevant to a number of price and cost issues in an antidumping investigation or review," the House Committee did not limit Commerce's ability to investigate "when a purchaser of the major input is in a position to exercise restraint or direction over the input supplier (or vice versa)" to instances of long duration. SAA 838, HR 78. Rather, if this ability exists during any relevant period for which input costs are being calculated, affiliation through control can be present.

8. Reporting of sales made by an affiliated party.

The Department states that it will not always require that downstream sales of affiliated parties be reported because "factors other than value, such as the comparability of sales, affect this decision." 61 Fed. Reg. 7333. The Department admits that this is an important issue with implications for accuracy of its calculations. *Id.* Certainly, when sales are demonstrably not comparable Commerce may not require that they be reported. But the statute requires reporting of all foreign like products (formerly known as such or similar merchandise). Section 771(16). Thus, the Department must require reporting of affiliated company data on all merchandise determined to be within the scope of the investigation.

9. Calculation of actual profit in constructed value situations.

The new law requires that the "actual" amount of profit "in connection with the production and sale of a foreign like product" be used for a determination of profit in the context of constructed value. Section 773(e)(2)(A); SR at 74. By referring to a profit calculation tied "a foreign like product" the statute specifically relates the profit determination to the basis for product matching in making price comparisons. Thus, a foreign like product is, in the first instance, the one "identical in physical characteristics" with subject merchandise. Section 771(16).

The proposed regulation language provides no guidance on the methodology the Department will follow to calculate actual profit. Rather, this guidance is contained in the explanatory material accompanying the proposed regulations. The Department has announced it will "use net profit figures to devise a per unit amount for profit." 61 Fed. Reg. 7335. The Department intends to calculate profit on aggregate rather than model-specific basis. *Id.* By broadening the calculation of profit beyond the product eligible for matching with the subject merchandise, the Department directly violates the statute.

The Department admits that the statute "arguably provides for a narrower basis for the calculation of profit and SG&A than did the prior statute." *Id.* But the Department believes the statutory language requiring calculation of actual amounts incurred for profit "in connection with the production and sale of a foreign like product" cannot be read literally. Otherwise, the Department "would have the discretion to pick and choose the sale of the foreign like product from which profit and SG&A would be taken. This clearly would undermine the predictability of the statute." *Id.* The Department's answer to its own strawman argument does not undercut the reasonableness of interpreting the statute to require calculation of profit on a product code (model-specific) basis. The statute does not require that one profit figure be developed for use in constructed value situations. Rather, the statute merely requires that profit calculations be made on the same basis as product matching.

Calculating profit on a product code basis is also wholly consistent with existing Department policy. In comparing prices, the Department properly intends to work within product code (model-specific) categories. §351.414(d)(2); 61 Fed. Reg. 7349. Similarly, cost of product calculations are done on a model-specific basis. The Department's proposal to "calculate profit and SG&A based on an average of the profits of foreign like products sold in the ordinary course of trade" reflects no narrowing of the basis for calculation of profit and SG&A required by the statute. Rather, the Department should change its policy on the calculation of profit and SG&A to bring it in line with its other calculation methodologies.

Calculating profit on a model specific basis imposes no additional burden on the Department or respondent. The Department intends to determine actual profit by "subtracting the cost (derived from COP data) from the home market sales price (derived from the home market sales data) to arrive at a net profit for each transaction examined." *Id.* Any aggregation of this data merely reduces its specificity and mitigates its reflection of market impact. Since price comparisons are normally made on a product code (model specific) basis, there is no theoretical justification for aggregating the collected data beyond the product code level.

The Department's methodology for calculating profit should not be relegated to explanatory material. The means of implementing the preferred method of calculating profit will

not vary from case-to-case and should be reflected in the regulations. Consistency in Department policy demands that regulation provide for calculation of profit on a product-code basis.

Finally, the regulations should also reflect that all costs will be calculated on producer and exporter records only if such "records are in accordance with generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sales of the product in question." Article 2.2.1.1. of the Antidumping Agreement; SR 74.

10. Enforcement of certification requirement.

Section 782(b), 19 U.S.C. §1677m(b), provides that any person providing factual information to Commerce must certify that such information is accurate and complete to the best of that person's knowledge. As the Senate committee has noted, in unfair trade investigations, "the incentive to provide accurate and complete submissions may be absent." S. Rep. No. 71, 100th Cong. 1st Sess. 114 (1987). Thus, beyond the correctness of submitted data, the provision was intended to avoid determinations "based on arguments that omit important facts known or reasonably available to the party making the submission of fact." *Id.* In practice, the certification requirement has been lightly regarded and the Department has not taken effective action to make certification meaningful.

Current Commerce regulations provide for certifications which are specific to each submission. 19 C.F.R. § 353.31(i). In the past, many parties clearly did not file submission specific certifications. Thus, Commerce states that the proposed regulation "clarifies" that each submission containing factual information must be accompanied by the appropriate certification regarding accuracy of the information." 61 Fed. Reg. 7326. Nevertheless, the proposed regulations are not adequate to achieve the goal of compliance with the statutory certification requirement.

Company certifications too often are merely photocopies of a certification signed early in the investigation. Such certifications do not establish that the official putatively making the certification has even read the document. At a minimum, the Department should require an original dated certification for each submission sworn before an authorized official equivalent to a notary public to authenticate the date of the certification.

Commerce's regulatory explanation should state that the company official certification is meant to require that the official be responsible for the accuracy and completeness of the data. cursory review should not be acceptable. Thus, Commerce should indicate it will require a detailed explanation where significant errors or omissions are found in the submitted data. Commerce regulations should authorize sanctions where such explanations do not dispel the presumption that the certification was falsely provided. Sanctions should include rejection of the specific data submission and substitution of facts available findings. Where the conduct involves an egregious violation of the certification requirement, the most adverse facts available finding should be made. Where more than one certification violation is found, the Department should reject all data submitted and base its determination entirely on adverse facts available.

We recommend that the Department adopt the following specific regulation language at the end of subsection (g): "Certifications must be specific to the document being filed and must be dated. Certification made in the United States must be made before a Notary Public. Certification in foreign countries must be made before comparable officials." A new subsection (h) should be added which provides: "(h) *Omitted or false certifications.* Whenever a factual submission is not filed with the appropriate certifications or is filed with a false certification, that submission will be rejected by the Secretary. The Secretary shall use facts available or adverse facts available for the data contained in the rejected submission dependent upon the Secretary's findings as the nature of the certification violation. If the Secretary finds more than one certification violation, the regulations should provide that the Department will disregard all data submitted and make a determination based solely on adverse facts available."

11. Initiation of new shipper reviews.

A new shipper review, like all administrative reviews under section 751 of the Tariff Act of 1930, is necessarily a retrospective process. The new shipper provisions are subject to 19 U.S.C. § 1675(a) and respondents must meet the requirements for conduct of a review, i.e. have sales to unaffiliated parties and entries for consumption. The proposed regulations properly set out the documentation necessary for a review in section 351.214(b)(4), which essentially mirror the requirements of 19 U.S.C. § 1675.

The proposed regulations also provide that:

(2) No Shipments. The Secretary may rescind a new shipper review, in whole or in part, if the Secretary concludes that:

(i) There have been no entries, exports, or sales, as appropriate, during the normal period of review. . . ; and

(ii) An expansion of the normal period of review to include entries, exports, or sales would be likely to prevent the completion of the review within the time limits set forth in paragraph (i) of this subsection.

Section 351.214(f)(2); 61 Fed. Reg. at 7367. Thus, the Department might extend a period of review where the exporter properly qualified for a review at the time it was requested, but where the information available for the period of review would make it difficult or impossible to complete a review.

The proposed regulation might apply where a shipper has an export price sale to an unaffiliated purchaser in the United States during the period of review but the shipment or entry for consumption is subsequent to the end of the period. As noted by the Department, the regulation might also apply "where a new shipper exports merchandise to an affiliated U.S. importer, but the importer does not resell the merchandise to an unaffiliated U.S. purchaser within the standard period of review." 61 Fed. Reg. 7308, 7318. But it is important to note the underlying assumption of the Department's example, to wit: the sale to the affiliated buyer involved an entry for consumption during the period of review.

Initiation of a new shipper review is not justified on the basis of mere shipments where neither a sale to an unaffiliated party or an entry was made in the review period. Thus, the SAA states that "Article 9.5 of the Antidumping Agreement [provides] new shippers with an expedited review that will establish individual dumping margins for such firms on the basis of their own sales Commerce will issue instructions to Customs for the final assessment of duties on all entries covered by the review." H. Doc. 103-316, 103rd Cong. 2nd Sess. 875 (1994) (emphasis added).

The new shipper provision, as enacted, was designed only to provide new shippers with the opportunity to have a margin determined expeditiously on the basis of their own sales. There is no mention in the statute, the Antidumping Agreement, or the legislative history of any prospective relief for new shippers that would entitle them to initiation of a review without either a sale or entry for consumption during the period of review. Due to the potential for misreading the Department's proposed regulation and example, the explanatory comments made with publication of the final regulations should clearly state that either a sale to an unaffiliated party or an entry must occur to justify initiation of a new shipper review.

12. Deferral of administrative reviews.

The proposed regulations establish "a new procedure by which the Secretary, upon request, may defer the initiation of an administrative review for one year." 61 Fed. Reg. 7317. The purpose of the provision is to "reduce the burden on all concerned by allowing the Department, in effect, to cover two review periods in a single review." Id. The proposed regulation provides that if a relevant party objects, the Department will not defer the review. §351.213(c)(1)(ii).

Whether or not the proposal to defer conduct of a review reduces the burden on the Department or parties, deferral is not consistent with the statutory scheme for reviews. The Department has traditionally maintained a significant backlog of uncompleted administrative reviews. Congress sought to avoid such backlogs in the future by tightening the statutory provisions governing reviews and requiring their timely completion. Once a review has been properly requested, the Department must initiate the review and complete the proceedings within the specified time frame. The Department's proposed regulation vitiates the statutory scheme by again permitting development of review backlogs. Moreover, consolidation of reviews carries the potential to deny the domestic industry relief provided by the statute. A respondent which anticipates an increased margin in a review period will obviously seek to defer the review so that its cash deposit rate does not increase for the next review period. The respondent might hope that the subsequent review with which the deferred review is consolidated will result in a more advantageous deposit rate thereby entirely avoiding application of the lawful deposit rate which would have been established as a result of the deferred review.

That the proposed regulation provides that deferral will not be invoked if a relevant party objects is not an adequate safeguard against abuse. In 1979, when Congress was concerned about the lengthy time being taken to conduct antidumping investigations, it established time frames for completion of investigations. Congress also permitted the time for completion of an investigation to be extended in "extraordinarily complicated" cases. But the Senate Committee stated that "in light of the importance of expeditious investigations, the authority's discretion to extend the time period under section 733(c)(1)(B) is narrowly circumscribed. The committee intends that few extensions be made under provision." S. Rep. 249, 96th Cong. 1st Sess. (1979). Yet, extensions of investigations are the rule rather than the exception. Likewise with the proposed regulation, a procedure whereby a party could object to deferral presents an illusory check on actual practice.

Finally, it is not clear that deferral of an administrative review will reduce the burden on the parties or the Department. The greater the distance in time between the entries being reviewed and conduct of review, the more stale and less available are the respondent's primary records and any non-respondent specific information which might be necessary to conduct of the review. Development of information relevant to a deferred review may in fact become more difficult than if the review had been conducted in a timely manner.

13. Exclusion of trading firms based on exclusion of producers selling to particular trading firms.

Treatment of trading companies appears in several contexts in the proposed regulations and the Department has specifically requested advice on how to treat such entities. With respect to the calculation of "rates" the Department states that it "is considering whether to promulgate special rules regarding the rates that should be applied to exporters that are not also producers, such as trading companies. In this situation, one alternative would be to calculate a separate rate for each exporter/producer combination, so that the rate to be applied to an exporter would depend upon the producer of the particular merchandise in question." 61 Fed. Reg. 7311. This is the best approach to trading companies and should be universally adopted by the Department.

Nevertheless, in the context of exclusion from coverage under an order, the Department has stated that "one alternative would be to limit the exclusion of a non-producing exporter to subject merchandise produced by those producers that supplied the exporter during the period of investigation." 61 Fed. Reg. at 7315. Similarly, the Department would limit the revocation of a non-producing exporter to subject merchandise produced by those producers that supplied the exporter prior to revocation." 61 Fed. Reg. at 7319.

Strict limitations on exclusion of trading firms from coverage under orders is necessary to avoid circumvention of relief. Trading companies which benefit from exclusion or revocation could begin selling subject merchandise from producers that had never stopped dumping. The best approach is the one identified by the Department in the context of applying rates. Limiting exclusion and revocation to specific trading company/producer combinations provides complete relief to both the foreign producers and exporters as well as the domestic industry. Moreover, this approach is consistent with assessment, which must be done on a producer specific basis. 61 Fed. Reg. at 7317.

**STATEMENT
ON BEHALF OF THE COPPER AND BRASS FABRICATORS COUNCIL, INC.
BEFORE THE SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS
UNITED STATES HOUSE OF REPRESENTATIVES
HEARING ON THE DEPARTMENT OF COMMERCE PROPOSED
ANTIDUMPING REGULATIONS AND OTHER ANTIDUMPING ISSUES**

April 23, 1996

This statement is submitted on behalf of the Copper and Brass Fabricators Council, Inc. ("Council") and its 23 member companies (see Appendix A for a list of the Council's members). The Council is a trade association which represents the principal copper and brass mills in the United States. These mills together account for the fabrication of more than 90 percent of all copper and brass mill products produced in the United States, including sheet, strip, plate, foil, bar, rod, and both plumbing and commercial tube. These products are used in a wide variety of applications, chiefly in the automotive, construction, and electrical/electronic industries.

Since early 1985, the Council and its member companies have brought a series of antidumping and countervailing duty cases before the Department of Commerce and International Trade Commission (ITC). These proceedings have resulted in the issuance of eleven antidumping duty orders and three countervailing duty orders against imports of brass sheet and strip and of low-fuming brazing rod from a total of eleven countries.

In taking these measures, the Council was reacting to a steady influx of dumped and subsidized imports that began in the late 1970's and carried forward into the 1980's. The United States is the most attractive market in the world for copper and brass mill products, and foreign firms have aggressively set their sights on penetrating it. Confronted by unfair competition from abroad, the Council has come to recognize that the continued existence of the U.S. copper and brass mill industry depends not only upon maintaining the high quality of its products but also upon strong U.S. laws against foreign unfair trade practices.

While the Committee is properly focusing on the proposed changes to Department of Commerce antidumping regulations, the Council strongly urges that equal attention be addressed to recent troubling developments at the U.S. International Trade Commission ("ITC") which seriously undermine the administration of the antidumping laws under the jurisdiction of the Committee.

In June of 1995, the Commission released a publication entitled "The Economic Effects of Antidumping and Countervailing Duty Orders and Suspension Agreements." Since its release, this report has engendered tremendous controversy. While the ITC is responsible for administration of a crucial element of U.S. unfair trade law - the determination of material injury to the domestic industry in antidumping and countervailing duty ("AD/CVD") actions - it nonetheless released this document, which concludes that U.S. AD/CVD actions represent a net cost to our economy of roughly \$1.5 billion annually.

The members of the Council have relied upon the AD/CVD laws in the past to counter surges of unfairly priced, injurious imports and consequently participated in the ITC's case study on brass sheet and strip. While certain information contained in the brass sheet and strip case study is reasonably reflective of the experience of the members of the industry, the Council takes issue with the ITC's broader characterizations within that case study and emphatically objects to the overall conclusion of the ITC's report that these unfair trade laws are a net drain on the U.S. economy.

The Council's disagreement with the ITC's study centers upon three major areas. First, the ITC's analysis does not fulfill the mandate of the U.S. Trade Representative ("USTR"), who

made the original request for the study. Specifically, the study does not explore adequately one of the fundamental elements of Ambassador Kantor's request, to investigate "the economic effects of the dumping and subsidy practices, as transmitted through unfair imports to the United States, which the orders and agreements address." Instead, the study focuses on a cost-benefit analysis of the removal of existing AD/CVD orders, which was only one aspect of the request of the USTR.

Second, the ITC's methodology in analyzing the economy-wide impact of unfair trade practices and AD/CVD orders does not capture longer-term costs to the U.S. economy of their termination. The ITC's report fails to consider the costs incurred as individual producers fail and entire industries fade into non-existence, the human costs to workers, and the long-range economy-wide and national-security implications of losing basic, critical industries.

Finally, the ITC's report focuses almost exclusively on domestic producers and industries and makes no real effort to consider the broader context of the worldwide industries in which domestic producers compete. The report reflects no consideration of the competitive postures of the foreign firms that engage in unfair pricing and their relative efficiency or inefficiency vis-à-vis U.S. companies, or their reasons for targeting the U.S. market.

In light of these major shortcomings, the report does not stand as a balanced assessment of the costs and benefits of unfair trade practices and U.S. remedies for such practices, but as a severely flawed exercise in economic modeling with extremely limited usefulness. Despite its incomplete nature, the ITC's report has been cited by foreign and domestic critics as an indictment of U.S. unfair trade laws, written by the very agency charged with their impartial administration. To counter such arguments, the Copper and Brass Fabricators Council believes that it is important to go on the record as a vocal supporter of strong, meaningful unfair trade laws, and in opposition to those who would use this simplistic and skewed analysis to justify the destruction of the existing laws, and, along with them, the U.S. industrial base.

A. The Study Did Not Fulfill the Request of the USTR

As requested by Ambassador Kantor, the ITC's study was to be designed to "enhance our understanding of the economic consequences of foreign subsidies and dumping as transmitted through unfair imports to the United States, and the effectiveness and economic impact of the remedies provided." In reviewing the ITC's study, it appears that the Commission staff only read the last part of this sentence, as it focused inordinately on the economic impact of AD and CVD orders, rather than dumped and subsidized imports, on the economy.

In its own words, the Commission's study "estimates the economy-wide effects of a simultaneous removal of outstanding AD/CVD orders in 1991." This focus is not the same as estimating the impact of foreign dumping and subsidization on the U.S. economy. The Commission's methodology assumes that the only manufacturers affected by unfair trade practices are those that have actually brought and won AD/CVD actions. This is not a valid assumption, because not every industry that is affected by unfair imports brings an AD/CVD action, and not every case that is brought is successful. It is unrealistic for the Commission to assume that in a country with a huge internal market, which is philosophically and as a matter of policy opposed to trade barriers, the only effects of unfair imports are felt by those industries that bring and win unfair trade cases. It is naive for the Commission to assume that in the U.S. which annually consumes over \$600 billion in imports, the only ill effects on U.S. industry are those presented in the minuscule number of unfair trade cases brought before the ITC each year.

An inability or unwillingness to bring an AD/CVD action may occur for several reasons: 1) affected producers may not be aware that remedies exist or may be in such dire financial straits that they cannot afford to bring such an action; 2) individual producers or regions may be differently impacted by dumped/subsidized imports, or so competitive with each other that marshalling the necessary industry support for a potential case may not be possible; and 3) the injury experienced may not be sufficiently dramatic to ensure the success of a case. Furthermore, it is clear from the Commission's own data that most unfair trade actions are not successful through the final injury determination: the report shows that between the years 1980 and 1993, just 33 percent of all AD/CVD investigations resulted in affirmative final determinations. In conclusion, the study's assumption that the only industries which have been

affected by unfair imports are those that have actually brought successful AD/CVD investigations is totally unwarranted.

The study made no effort to examine industries that have failed to address unfair imports, including the industries in the 67 percent of the cases in which AD/CVD duty orders were not put into place, not to mention the countless firms who, through ignorance or severe financial straits, could not avail themselves of the statutory remedies. An interesting counterfactual example could have been provided by examining the history of a domestic industry that faced competition from dumped or subsidized imports (margins found by the Department of Commerce), but that was denied relief because of a negative final injury determination at the ITC.

Such a contrast could have provided a very interesting basis for comparison with the highly-selective case studies that were presented. How have industries that have been denied relief fared? Have consumers benefitted in the long term? Have the domestic participants in these industries been able to turn around their operations without relief? If not, how much of the domestic industry is left? How many workers have unjustly lost their jobs, and what has been the economic and social cost to individuals, their families, communities, and local governments, of their job losses, plant closures, and attendant economic dislocations? What is the state of the geographic regions in which such operations have failed? Such questions are directly relevant to USTR's charge, but were not even addressed by the ITC report.

If the Commission found such concerns to be beyond the capabilities of its economic model, it should have informed the USTR that the exercise as requested was simply not feasible, or stated that the results of its limited number of case studies should be qualified and balanced by this much larger universe. Instead, the Commission interpreted the request as it saw fit, with the result that it was only able to provide an estimate of the partial effects of removing existing AD/CVD orders and a very few case studies. This represents just the tip of the iceberg of the overall deleterious impact of dumped and subsidized imports on domestic producers and the U.S. economy.

B. The Study Did Not Capture the Long-Term Economic Effects of Dumped and Subsidized Imports

The ITC's economy-wide analysis was based on the assumption that by allowing dumped and subsidized products to enter the U.S. economy at lower prices, user industries and consumers would realize a net savings that would more than compensate for the negative impact on petitioning industries and suppliers of their raw materials. The study found that the total cost to the petitioning and upstream industries of removing existing AD/CVD orders would have been \$658 million and job losses of 4,075 full-time workers, but that in the light of lower prices to consumers and increased efficiencies in other industries, the net benefit to the U.S. economy would be \$1.59 billion dollars annually.

The calculations and assumptions embodied in the Commission's economic model tell only part of the story of the impact of unfair trade practices, however. The most egregious shortcoming of the Commission's analysis is that it does not take account of the longer-term economic effects of unfair trade practices. For practical purposes, the Commission staff confined the study to events within a single year (1991), because an exercise incorporating more than a one-year period is beyond the capabilities of existing economic models. By the Commission's own admission, the model it used in its study is static and "cannot take into account the cumulative or dynamic effects of existing orders, which may have been in place for many years."

This limitation constitutes such a significant shortcoming as to bring the utility and purpose of the entire study into question. This point was not lost on a majority of the ITC commissioners, four of whom either refused to sign off on the release of the study or expressed serious reservations about the study's findings. This lack of unity and refusal to stand behind the Commission's study, on the part of not one, but of 4 of 6 Commissioners, is an extraordinary, if not unique development in the history of the Commission's work under Section

332. Vice Chairman Nuzum and Commissioner Rohr, for example, stated that "The short term focus of the Commission's CGE modeling exercise also overlooks the long-term competitiveness implications of injury from unfair trade practices," and that "we have not been able to provide the full picture of the impact of unfair trade practices on the domestic economy."

Simply put, the study could not take account of business failures and the collapse of domestic companies beset by unfair imports. In the Commission's model, the damage to domestic producers in the wake of the removal of outstanding AD/CVD orders would be limited to lowered volumes of product shipped (in the face of increased import volumes) and lowered prices (as imports would be allowed to enter and compete in the U.S. market at prices lower than those under the AD/CVD orders), and the related impact these market factors would have on production indices (reduced employment and hours worked, for example).

It is true that in the short-run, the impact of the unfair imports could be limited to such effects. In the longer term, however, declines in shipments and prices can result in a chain of deeper, even more severe consequences: cash flows become depressed and production efficiencies decline as economies of scale are reversed; depressed cash flows lead to constricted budgets for capital investment and research and development; constricted capital investment and R&D budgets result in losses in efficiency relative to foreign competitors; losses in efficiency result in greater price disparities between domestically produced and imported products; greater price discrepancies result in further lost sales and declines in shipment volumes, and the entire cycle begins again. Several rounds of such a cycle of injury result in the complete loss of competitiveness of the domestic producer, ultimately resulting in failure. If the foreign competition is on a large enough scale, entire domestic industries can be wiped out -- and have been wiped out.

The failure of a producer has an impact well beyond the removal of its output from U.S. GDP. First and foremost, employees lose their jobs. The immediate costs of unemployment compensation are paid by state and federal governments, but it is individual workers and their families that pay the most severe costs. In many cases, the skills that these workers have developed over the course of their professional careers become meaningless, as other employers in the industry may not be proximate and are unlikely to be hiring, given that they too would be facing unfair import competition. The devaluation of an individual American's "human capital" cannot be captured in any economic model, but that does not mean that our economy does not suffer a loss.

The failure of a manufacturer means that the capital which has been invested in productive capacity and distribution systems becomes worth little or nothing. The funds of investors are lost, and the idling of plant and equipment represents a cost to the U.S. economy that is unlikely to be reversed. Upstream suppliers of failed firms may, in turn, face insolvency themselves, depending on the degree of dependence. Through a chain-reaction of failure, in smaller communities with non-diversified economies the loss of a major employer can decimate the economic health and tax base of the entire community.

These long-term, "real world" consequences of unfair foreign competition are not captured or even acknowledged in the ITC's economic model. Nor has the ITC's study made any effort to determine if the assumed "benefit" of unfair competition (lower U.S. prices) remain available in the longer term: once a domestic producer and/or industry has been driven out of existence, do import prices remain at dumped levels? Or do foreign producers use predatory pricing as a means of driving out competitors, eventually increasing prices and maximizing longer-term profitability? A reduction in competition based on unfair trade practices cannot provide a long-term benefit to the consumer.

Any attempt to assess the impact of unfair trade practices and AD/CVD orders that is limited to the short term cannot take account of concerns such as these. No one reasonably defines economic success in terms of single-year periods, and businesses do not analyze capital investment projects within a one-year horizon. How then can any study assessing the economic effects of AD/CVD practices and orders consider the impact within just a single year?

The "full picture" of the impact of unfair trade practices is quite different from that demonstrated in the assumptions and boundaries of a static academic modeling exercise and must include long-term business failure and the very real potential for the destruction of entire domestic industries. Without taking the full picture into account, any cost/benefit analysis of unfair trade practices and remedies, however technically elegant, cannot be considered useful in a discussion of U.S. international economic policy. For this reason, decision makers should not be misled by the "bottom line" guess provided by the ITC's report of the net short-term benefits of removing antidumping and countervailing duty orders.

C. The Study Did Not Analyze Domestic Industries in the Context of the Worldwide Industries in Which They Compete

In his request to the ITC, Ambassador Kantor stated that he envisioned the study as a means of assessing U.S. competitiveness, specifically mentioning the need to consider "effects in country markets other than the United States" including the "country of origin of the product subject to the order." Rather than analyzing unfair trade practices and U.S. remedies in the broader context of the global market in which U.S. manufacturers compete, however, the ITC's analysis limited its focus strictly to trends within the domestic market. The report reflects no consideration of the competitive postures of the foreign firms that engage in unfair pricing and their relative efficiency vis-a-vis U.S. companies or their reasons for targeting the U.S. market. This represents a significant shortcoming and is indicative of the fragmentary and unintentionally biased nature of the ITC study.

Any analysis of the impact of dumping and subsidization on the U.S. economy should bear in mind who is committing the illegal act. While the domestic industry must demonstrate injury by reason of the dumped or subsidized imports in an AD/CVD action, it is the foreign producers who are the root of the problem. A balanced assessment must not lose sight of the fact that an AD/CVD order cannot be put in place unless and until it is determined that a foreign producer has committed an act which is unlawful under the laws of the United States and condemned under the Antidumping and Subsidies Agreements of the World Trade Organization.

The ITC's study fails to put this point into perspective. The study incorporates no information concerning foreign producers and markets, apparently reflecting the Commission's position as the agency responsible for determining whether or not the domestic industry is injured in AD/CVD actions, rather than that which examines the specific actions of the foreign producers (the AD/CVD margins are determined by Department of Commerce under U.S. law). In light of the Commission's perspective, the study wrongly concentrates exclusively on the actions and trends within the U.S. industry, and does not consider a whole host of issues which could have been illuminated, such as why foreign producers dump, why national governments subsidize industries, the long-term benefits of dumping and subsidization to foreign companies, trends in global production capacity for relevant industries; whether dumping occurs disproportionately in the U.S. market, and trends in the home markets of producers whose products have been assessed U.S. antidumping and countervailing duties.

Most importantly, the study should have attempted to answer two very important questions in assessing the impact of unfair trade practices and the relative position of U.S. producers in their global industries. First, if foreign producers subject to countervailing duties are efficient relative to their U.S. counterparts, why do they need equity infusions and other countervailable subsidies from the state? Second, if foreign manufacturers subject to antidumping duties are truly the world's low-cost producers, why must they be sheltered from competition through protected home markets that enable them to charge higher prices there than in the United States? Any assessment of unfair trade practices must acknowledge that when foreign firms and governments attempt to "create" comparative advantage and drive legitimate competitors out of the marketplace, the effects on international trade are unacceptably costly.

The fact of the matter is that the U.S. market is the largest and most attractive in the world, and relatively low in tariff and non-tariff barriers to imports. Many foreign producers are willing to "buy" market share in our country at dumped and/or subsidized prices knowing that the large volume of sales to the huge and open U.S. market will allow for longer production

runs, full employment for their own workers, and optimum utilization of capacity, among other benefits.

Dumped and subsidized imports only achieve success in the U.S. market through artificially low prices that cannot last in the longer term. This is demonstrated in the ITC's case study on the U.S. market for brass sheet and strip. The imposition of antidumping and countervailing duties had a significant impact on subject imports of C20000 series sheet and strip, which declined from 128,462,000 pounds in 1985 (the year before the first petition on the product was filed) to 75,153,000 pounds in 1987 (the year the first order was issued), and had fallen to 19,249,000 pounds by 1991, an overall decline of 85 percent. Given that AD/CVD duties are designed to be offsetting, rather than punitive, in nature (that is, they are designed only to equalize prices in the U.S. and home country markets), this significant decline in import volume after the imposition of the AD/CVD duties indicates that the subject imports could not compete on a "level playing field," and that their previous success was only made possible by unrealistic and artificially low prices to the United States. Also, the magnitude of some of the less-than-fair-value margins determined by the Department of Commerce (for example, 57.98 percent for certain Japanese brass sheet and strip and 42.24 percent for French) indicate that the dumping occurring by these foreign producers could not have been transitory, or a result of currency exchange shifts. Such disparities between home market and export prices clearly imply a conscious, premeditated strategy of price discrimination between markets, with the intention of buying and retaining market share, no matter where the true comparative advantage lay.

International trade theory is predicated upon the assumption that all markets are open to trade, that all economies are freely competitive, and that economic participants take actions that are rational. In reality, none of these conditions holds true consistently. Instead, U.S. producers face foreign markets that restrain imports, whether by policy or practice; foreign producers that hold monopolies in their home markets, but still require equity infusions and preferential policies from their governments in order to survive; and foreign competitors and governments that take actions that are not economically rational (however politically and socially expedient), such as pricing below variable cost and making new capital investment in industries already characterized by global overcapacity. In a world which rarely reflects the assumptions of the economic theorist, the policy maker must be extremely wary of any modeling exercise that uses such assumptions as a foundation.

D. Conclusion

The unfair trade laws were designed to protect U.S. producers and workers from the capricious and malevolent effects of dumped and subsidized imports, and they have been reasonably effective in achieving this goal. As U.S. tariff levels decline toward insignificance and international agreements limiting imports such as the Multifiber Arrangement are abandoned, U.S. industry becomes exposed to increasing levels of import competition. The antidumping and countervailing duty laws remain one of the last means of defense for domestic industries attempting to compete in a global economy in which many participants still are not exposed to market forces and do not have to "play by the rules." As such, these laws should be encouraged and facilitated. Instead, the U.S. International Trade Commission, one of the two U.S. government agencies charged to impartially administer such laws, has produced a methodologically flawed and biased Section 332 study, a study which four of the Commissioners themselves have questioned, and in which misleading conclusions have been used to attempt to discredit the very laws the agency administers. The Copper and Brass Fabricators Council, which participated in and gave the Commission its full cooperation during the study, feels strongly that it must register its opposition to the conclusions of the study with this Committee, while acknowledging and complimenting the four Commissioners who had the courage to oppose its publication.

We also urge the Committee to pursue this matter specifically in a future oversight hearing devoted to examining the performance of the Commission.

Respectfully submitted,


Joseph L. Mayer
President and General Counsel
Copper & Brass Fabricators
Council, Inc.

Date: April 23, 1996

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**STATEMENT OF EUROPEAN CONFEDERATION OF IRON AND STEEL
INDUSTRIES**

HOUSE OF REPRESENTATIVES

**COMMENTS OF EUROFER ON PROPOSED ANTIDUMPING REGULATIONS
SUBMITTED TO THE COMMITTEE ON WAYS AND MEANS
SUBCOMMITTEE ON TRADE
MAY 7, 1996**

This statement is submitted on behalf of the European Confederation of Iron and Steel Industries ("EUROFER") in response to the Subcommittee on Trade's (the "Subcommittee") invitation for comments in conjunction with the Subcommittee's hearing on the proposed antidumping regulations. EUROFER greatly appreciates the opportunity to participate in the Subcommittee's consideration of new rules and procedures to implement U.S. antidumping ("AD") procedures. We have noted with particular interest the Department of Commerce's (the "Department") stated objectives to create a set of specific and predictable rules, to simplify and streamline administration of the law, and to remove inconsistencies in the Department's administrative practice. We commend this effort and hope that our comments, submitted below, will help you further those objectives.

EUROFER is a trade association whose members include national steel federations and steel companies in 13 of the member states of the European Union ("EU"). Collectively, EUROFER members are the largest steel producers in the world with an annual output of approximately 150 million metric tons. The objectives of EUROFER are cooperation among the national federations and companies in all matters which contribute to the development of the European steel industry and the representation of the common interests of its members vis-a-vis third parties. In this capacity, EUROFER acts as petitioner for antidumping remedies in proceedings in the EU. In proceedings in other countries, EUROFER members act as respondents on an individual basis. In addition, a number of EUROFER member companies have manufacturing, processing and distribution subsidiaries in the United States that have been involved in or affected by U.S. antidumping proceedings. While EUROFER itself plays no role in such proceedings, it is in a position to speak on behalf of the membership on a number of shared concerns and objectives. The comments that follow thus combine EUROFER's experience as a petitioner with its members' experience as respondents.

At the outset, we want to be perfectly clear about the role we see for antidumping. For us, it is a valuable -- often an indispensable -- tool for ensuring that international trade in steel and other products remains as fair as possible. As a matter of philosophy, we believe in effective antidumping laws. As a matter of practice, we use those laws to ensure the fairness of import competition in our own market.

While EUROFER supports antidumping in principle as well as in practice, it regards the current American system as needlessly and harmfully unfair, complex and costly. Drawing on our experience as petitioners and respondents, we address three basic questions: How can U.S. antidumping procedures be made simpler, fairer, and more cost effective? How can the system produce more realistic antidumping margins so that trade flows can be corrected rather than further distorted by the application of remedies? How can the system be made more predictable for all parties?

In the interest of brevity, we have taken a selective approach. In presenting the issues this way, we wish to emphasize the cumulative and interactive effects of various features of the U.S. antidumping system. The effects of many issues, perhaps in themselves small, are magnified by others.

For example, the problem of impossibly short deadlines is exacerbated by excessive data demands and compounded by the punitive use of "best information available." This implies that correcting the imbalance in the current system will require not one but a series of steps. There is no "silver bullet."

How to make the system fairer, simpler, and more cost effective?

A fair antidumping system is one that produces fair results. This does not mean that there never would be margins, nor that injury would not be found. On the contrary, a fair antidumping system would enable injured producers -- regardless of their size and financial resources -- to get the remedy they deserve when imports truly cause injury, to do so as expeditiously as possible, and at a reasonable cost. Similarly, a fair antidumping system would enable respondents -- regardless of their size and financial resources -- to receive antidumping margins that reflect actual commercial realities and underlying competitiveness, to do so as expeditiously as possible and at a reasonable cost.

Our thesis is: the simpler and more cost effective the system, the better it is for respondents, petitioners and antidumping authorities alike. There is no reason why lawyers and professional experts must be retained at great cost to produce volumes of data that are bound to be ignored. There is no reason why every proceeding has to run the full statutory timetable -- and in some cases beyond. There is no reason why even large corporations should have to decide that the cost of defending oneself outweighed the chances of getting a fair result.

It is difficult to exaggerate the financial and administrative burden placed on respondents by the complexity and cost of the current American system. Based on an informal survey of a few of our members, we have preliminarily concluded that:

- The cost of outside attorneys and other experts typically runs to \$1 million for the investigation phase of an antidumping proceeding.

- Antidumping proceedings impose large internal costs on the companies involved. Each case takes up hundreds of hours of management time. Staff time must be calculated in terms of thousands of hours per case. This increases the cost of defending oneself in an American proceeding by at least 15-20 percent.

- The Department's extensive data requirements disrupt the normal work of many parts of each company. One respondent noted that a recent verification required the involvement of 50 different people from different offices within the company.

- The high cost of American proceedings tends to perpetuate itself over time. Each set of yearly administrative reviews frequently requires out of pocket expenditures of \$1 million or more.

Judging from anecdotal evidence, it seems that the European experience is not unique. The Japan Iron and Steel Exporters' Association informs us that its members spent approximately \$4.5 million for the injury phase of the 1992 investigations on flat-rolled steel and a roughly equal amount on the Department of Commerce phase.

The Subcommittee should not underestimate the degree to which such exorbitant costs can constitute a non-tariff barrier. Even the largest exporters have to weigh carefully the costs of defending an AD complaint against the likely stream of revenues from the exports in question. In the past several years, several foreign producers have decided not to participate in the Commerce Department phase of their cases.

We would note that smaller American companies struggle with the same inflated cost structure when they contemplate using the antidumping law to remedy the impact of unfair trade practices. No system that works this way can be considered as truly fair.

Many useful ideas have already been proposed that would make the system work more fairly, simply and without unnecessary cost. The Department proposes to make a number of helpful changes, but they are not extensive nor systematic enough to move the system definitively in the direction of the goals the Department has established for itself. We would highlight a few major issues:

--Keep the questionnaire simple. The questionnaire used to gather the essential data for determining the existence and size of dumping margins is the essence of the antidumping process. The Department has attempted to revise it in ways that we hope will prove useful in practice. We are also appreciative that the Department has offered to conduct a questionnaire presentation to explain the requirements to the respondent. At the same time, the Department needs to be ever vigilant that unnecessary questions do not creep into the questionnaire. The data that are requested have to be generated by employees of the respondent companies. These people have other jobs. As noted above, it is hugely costly and disruptive to the on-going work of manufacturing and marketing to have to deploy key personnel literally for months at a time to respond to the data demands of the Department.

--Reduce the scope for supplemental questionnaires. Some American petitioners have learned to "game" the process. They dribble out new data demands and raise new issues throughout the process of investigation and review, knowing that this approach maximizes the burden on respondents, increases the chances that honest mistakes will be made or questions left unanswered, and depletes the respondents' budget available for the case. To the extent practicable, the Department should put an end to this abuse. Unfortunately, the proposed regulations do not seem to limited the potential for such abuses. Indeed, we are concerned that additional room for harassment has been created by such provisions as the proposed regulation on sales below cost on a country-wide basis [Section 351.301(d)(2)(i)(A)].

Petitioners should be expected to put their best case forward in the petition and the preliminary injury hearing. It is only fair that they should have opportunities subsequently to raise legitimate issues that sometimes arise in the course of the investigation. However, it is grossly unfair to allow petitioners to dictate how, when and in what form the issues must be addressed. It is particularly objectionable that petitioners should be able to place respondents in the position of having to answer a massive supplemental questionnaire with as little as one week to provide complete answers, as happened in the 1992 flat-rolled steel cases.

One approach would be to establish a deadline for the introduction of such issues to permit the respondents to have adequate time to research, draft and (often) translate a complete response. We note that in the EU system the petitioner does not have the power to dictate the pace and scope of the investigation. Once the petition is filed, the Commission authorities take full control. While such a procedure would not necessarily work in the U.S., the Department should study the EU practice and put itself in a position to "just say no" to manipulative petitioners.

--Accept standard accounting reports. The Department's practice of demanding financial data in its own *sui generis* format injects excessive and needless cost to the system. It is unfair to require respondents to reformat all their data for the convenience of the Department. We welcome the

Department's proposal to modify the questionnaire to collect documentation that would link the reported sales data to the respondent's general ledger. We are not certain that in practice this will go far enough. The respondent should be required to provide the data in a form that conforms with the generally accepted accounting principles of its own country. With the increasing globalization of business, there is less and less justification for requiring the extra effort, time and expense against an already tight deadline to reformat financial data solely for the Department's use.

--Delimit the scope of investigations to products made in the U.S. An industry cannot be injured by the importation of goods it does not produce, unless they truly are close substitutes. Sometimes the "class or kind" of merchandise defined by the Department includes products, usually imported in small volumes for specialized manufacturing, that are not made by domestic producers. This defies good sense and imposes additional, unnecessary costs on American manufacturers. To avoid this, the Department should devise a transparent system for making scope determinations at the earliest possible point in the investigation. It makes no sense to clutter the investigation with data about products not made in the U.S. Instead, the Department should establish clear standards on the basis of which it will exclude such products from the investigation.

--Use the "targeted dumping" provision carefully. The Department should acknowledge that certain commercial pricing decisions and trends, such as different pricing for smaller or larger orders, do not constitute targeted dumping. The Department should define more clearly how it will determine whether targeted dumping exists, to which sales the average-to-transaction methodology will be applied, and the evidentiary threshold that must be crossed for a targeted dumping investigation to be initiated. When targeted dumping is found, the Department should emphasize its preference for use of the average-to-average methodology. It would particularly inappropriate to use the average-to-transaction methodology in the absence of the same pattern of sales in the comparison market.

--Scrap the system of retrospective duty assessment. Alone among major uses of antidumping, the United States assesses AD duties on a retrospective basis. This requires a costly and cumbersome system of collecting cash deposits, developing detailed information on prices and costs for periods after the original investigation (in effect, a new AD investigation for each year the order remains in effect), rehashing arguments over methodology, assessing the duty payable years after the date of importation, and returning excess deposits with interest. This process consumes the resources of the Department, the Customs Service, petitioners and respondents alike. For the benefit of all parties, it should be scrapped and replaced with a system of normal values.

As these examples demonstrate, there is ample room for the Department to simplify the AD process. Other countries do it more simply without a loss of effectiveness.

How can dumping margins be calculated more realistically?

The purpose of the U.S. antidumping statute and all similar statutes based on the same international agreements is to offset the injury caused by dumping. It is remedial, not punitive, in its intent and should serve that purpose in practice. Not surprisingly, some petitioners, with huge financial and intellectual resources at their command, have undertaken to use every device to inflate dumping margins, with little or no regard to the underlying competitiveness of the exporters or the commercial realities that underlie the trade. Yet realistic margins, grounded in real data, are essential to the antidumping law's remedial purpose. The overriding objective of antidumping

administrators should be to ensure that the margins will remedy the injury to producers without causing new, unnecessary and unjustified injury to downstream producers and consumers. Inaccurate, artificially high margins are inherently distortive of fair trade and should be avoided.

To that end, the Department should consider the following steps, among others:

--Minimize the use of "facts available." In the past, the Department has used "facts available" (formerly known as "best information available" or "BIA") liberally. We readily acknowledge the need to use alternative sources of information when respondents fail to provide adequate information or to substantiate it in a verification. However, it is a fact of life that many respondents make a rational decision about the economic costs and benefits of "cooperating" with the Department. Just as they should not be rewarded for their non-cooperation, otherwise cooperative respondents should not be punished for minor mistakes, omissions and failures to produce all requested documents, particularly when such documents are not in their control.

Whenever this happens, the specific result bears no relationship to the commercial reality of the situation. That produces a "remedy" that is excessive in relation to the commercial realities. In the immediate case, the interests of the producer, importer and consumers are harmed. In a larger sense, the very legitimacy of antidumping is called into question.

We commend the Department for making it clear that the presumptive adverse inference associated with the use of "BIA" is no longer to be employed. However, the proposed regulations retain a punitive use of facts available when a company decides not to incur the extraordinary cost of the proceeding. It is not fair to penalize a company for making an economically rational calculation about the cost of participating in the proceeding. The Department should reserve punitive use of facts available for cases of deliberate misrepresentation of the facts. Moreover, all respondents, regardless of the degree to which they are deemed to have cooperated, should be permitted to submit comments on what facts available should appropriately be used.

--Make reasonable allowances for the level of trade. We are concerned that the Department may have taken an overly theoretical approach to this issue in the proposed regulations. We welcome the Department's recognition that "prices within a single level of trade, defined by seller function, can be affected by the class of customer" and its intention to make every effort to compare sales at the same level of trade and the same class of customer. However, the new regulations would still permit level of trade allowances based solely on patterns of price differences to different classes of customers.

--Use a reasonable calculation of profit in constructed value cases. Under the new law, the Department is required to determine profit for constructed value on the basis of sales "in the ordinary course of trade." Petitioner interests are using this language to argue that the Department should exclude all below-cost sales from any calculation of profit. Obviously, that would artificially inflate the constructed value and thus the dumping margins. We support the Department's view that only those below-cost sales disregarded under section 773(b)(1) of the Act should automatically be considered to be outside the ordinary course of trade.

--Deduct profit from normal value to make a fair comparison. The URAA requires a deduction from constructed value for profit. This will add to margins where merchandise is sold in the U.S. by a domestic subsidiary of the exporter. The new profit calculation methodology will also be applicable to sales for which there is value added in the U.S. Although the concept of making a

deduction for profits is similar to current EU practice, the methodology which the Department will use is quite different. The profit deduction will be based on profit earned in both the U.S. and the home market. Moreover, the statute does not require a comparable deduction from normal value, although it does seem to permit one. The Department should make a deduction for profit from normal value so that a "fair comparison" is possible between export and home market prices.

--Affiliated parties. The URAA expands the class of entities that are considered to be "affiliated." In the past, ownership relationships were required for entities to be considered "related." Now it appears that contractual relationships can create "affiliated parties." Once parties are considered to be affiliated, the Department may ignore the prices of goods purchased from the affiliate as inputs, or sales made to the affiliate. This generally increases dumping margins. The Department is authorized to punish parties for not supplying sales and cost information from any affiliated party.

The Department should require substantial evidence of genuine control before the parties can be compelled to produce information from their affiliates. If it does not, there is a real potential for abuse if petitioners demand information relating to the nature of the relationship between slightly related parties and the prices they charge to one another. Such "fishing expeditions" would place unjustified legal and informational requirement on the respondent and open up unwarranted possibilities for the use of facts available.

--Reject the proposal to adjust dumping margins for reimbursement of CVDs. The Department has proposed to adjust dumping margins in cases in which exporters reimburse importers for the payment of countervailing duties. This is wrongheaded for several reasons. First, it reverses longstanding practice even though neither the World Trade Organization rules nor the URAA require it. Second, it mixes the antidumping and countervailing duty statutes in a confusing way. Antidumping is designed to offset a price advantage in the export market; countervailing duties offset revenue advantages to the exporter. When an exporter reimburses an importer for the CVD paid, his revenue advantage is nullified just as surely as if his government had collected an export tax of an equal amount. Indeed, the reimbursement option should be more attractive to Americans as the revenue ends up in the U.S.

How to make the system more predictable for all parties?

Predictability is another key to fairness. It can also help simplify the system, reduce the scope for unintentional dumping and avoid squandering the scarce administrative resources of the Department on cases of little merit. An unpredictable system works to the detriment of all parties: exporters and importers have no reliable guide to pricing or to the structuring of transactions, related parties have no clear understanding of the rules for their investment in the United States, and American petitioners themselves no way of evaluating their chances of success. By contrast, a more predictable system would help reduce and eliminate dumping situations because importers and exporters could more readily and accurately judge their exposure to antidumping action. Investors in distribution systems and processing facilities could make more rational decisions about the projected return on investment. A more predictable system would also help petitioners avoid the huge expense of preparing and pursuing complaints when their chances of success were minimal.

The predictability of the antidumping system would be greatly enhanced by the changes we suggested under the rubric of making dumping margins more realistic and simpler. Antidumping practitioners (i.e. attorneys) love to debate and discuss the nuances, paradoxes and inconsistencies of the law and regulation. The true practitioners of international trade (i.e. producers, importers

and exporters) find these issues maddening. The uncertainty that is so beneficial to the legal profession can discourage even fairly priced trade. Beyond the steps outlined above, antidumping duty proceedings could be made more predictable by adoption of the following measures:

--**Use reasonable rules for exchange rate fluctuations.** Recent events have underscored once again how volatile and unpredictable exchange rates can be. Normally, it is impossible to determine *ex ante* that a sustained exchange rate shift is occurring. The Department's unwillingness to deal in detail with this issue because of a lack of experience merely underscores the difficulties that exporters might have in deciding when and how much to adjust their prices in such circumstances. The absence of experience is no excuse not to establish guidelines for those who have to make decisions in the real world of international trade.

--**Date of sale.** The date of sale regulations should clarify that the invoice date should not be used for indirect export price sales such that these sales would be reclassified as CEP sales. The regulations should explicitly provide that the use of the date of invoice as the date of sale may not be appropriate in some circumstances such as long-term contracts.

--**Establish a binding ruling procedure.** The Department should institute a system for issuing binding ruling letters whereby parties can obtain advance rulings on the interpretation of regulations. Questions of scope, the countervailability of certain subsidies, and price comparison methodology are obvious examples. By knowing in advance what the consequences of certain actions would be, importers and exporters can act to avoid creating situations in which dumping and countervailing duty complaints are likely. Similarly, potential petitioners would have an alternative to investing heavily in a complaint and having to wait a year or more to get basic issues of interpretation resolved.

While we understand and to some extent sympathize with the Department's reluctance to create "bright line" rules on a wide range of issues that arise in antidumping cases, we urge that trade practitioners be able to avail themselves of a system similar to that employed by the Customs Service.

--**Ensure consistency throughout the proceedings.** Consistency has at least two dimensions. First, the Department's rulings from one investigation to another should be consistent. The same essential facts -- e.g. regarding the existence and functioning of a subsidy program -- should produce the same results from one case to another. Second, the Department should ensure that the treatment of facts and issues is consistent -- and consistently fair -- from the investigation phase through the review stage of each proceeding. To do otherwise would be similar to staging a football match and, after it is over, deciding that for the second and third quarter of this match a touchdown was worth 5.5, a field goal 3.75 and an extra point two points.

Conclusion

In a global economy it is folly to punish those who have invested in your country. Related party transactions have been singled out for particularly harsh treatment in the URAA. Yet these are the same companies that have invested in America, creating jobs and adding value in your country. We would have thought that America's national interest would require that such companies be treated fairly and that they and their customers be provided as much predictability and clear guidance as possible. The aim should be to enable such companies to plan rationally, to make informed decisions about sourcing and pricing, to enable them to be the good corporate citizens they strive to be, and to act in such a way that their exposure to antidumping remedies are minimized, not maximized.

This sampling of the issues involved in the Department's rulemaking is broad enough to underscore the range of the review now underway. The Department is to be commended for taking a comprehensive review of the regulations. The world has changed fundamentally since they were last reviewed in the 1970s.

We believe it is possible for the U.S. to achieve an antidumping system fit for the next century, and we consider it essential to do so for the sake of exporters, importers, consumers, industrial users – and ultimately for American producers themselves. America stands above all for procedural fairness. Its moral authority as a leader in the trading system stems from its longstanding championing of the cause of the rule of law. As international trade grows in volume, complexity and importance, as production becomes increasingly global, as interdependence becomes a fact rather than a textbook concept, all trading countries need to modernize their laws and institutions to take account of the new realities.

Perhaps it would be good for all antidumping authorities in the world to take a pledge similar to the Hippocratic oath: First, do no harm. Antidumping is supposed to remedy injury, not to generate new injury. Such a judicious result will require carefully drawn regulations that are balanced, fair and transparent; they will further require a judicious application from case to case. New policies should be entered into carefully, after full discussion and debate. That is our hope for this rulemaking. We hope that our comments will be helpful to the Subcommittee in its continuing oversight of the antidumping system.

STATEMENT OF INTERNATIONAL ASSOCIATION OF DRILLING CONTRACTORS

The International Association of Drilling Contractors (IADC) is the sole organization representing virtually the entire global oil and gas contract drilling industry, the most substantial percentage of which is comprised of U.S. companies. These companies are engaged by the oil and gas producing companies in the search for new sources of hydrocarbons.

Absent a "short supply" or temporary duty suspension procedure, the economic effects of antidumping and countervailing duty laws on drilling contractors harms many companies considered to be in the family of small businesses. The smaller drilling companies--like their counterparts in communities across the nation--are those that suffer the most when these laws operate to create shortages in goods and equipment essential to their operations.

It is not widely understood that oil and gas companies almost never own the equipment used in the exploration for new sources of hydrocarbons. That specialized task is provided by drilling contractors who conduct the exploratory work on land and offshore at the direction of their customers, the oil companies. If reservoirs of hydrocarbons are discovered, the drilling contractor most typically has no ownership interest in the found reserves. Rather, the drilling contractor furnishing services to an oil company is more akin to a building contractor, who on completion of the client's assigned task of erecting a building to a specific design, moves on with his equipment to (hopefully) another job. Drilling contractors build boreholes, simply put.

The machinery involved in a drilling rig is diverse and--with larger land and offshore rigs--exceedingly expensive. And, above all, it is subject to the most extraordinary wear and tear as it employs vast amounts of power to chew through rock into deep zones of intense pressure and heat to seek out geological traps holding oil and/or natural gas. As the drilling rig placed on a potential well site operates, it drives a bit at the end of an ever-lengthening string of pipe into the earth's crust. That pipe must have tensile characteristics to twist, bend and support a great column of weight, in addition to withstanding the intense pressure and heat associated with drilling depths.

Drill pipe is included within the class of oil country tubular goods (OCTG) which was targeted by seven U.S. steelmakers in a petition filed at the International Trade Commission on June 30, 1994. Drill pipe accounts for less than one percent of the total tonnage for OCTG. Until the year 1995, drill pipe was available both domestically and internationally. In early 1995, the International Trade Administration published proposed penalty tariffs on OCTG produced in several countries. The effect of that publication was to immediately impose price increases of nearly 50% on most foreign drill pipe. Several of the countries ultimately included in the "dumping" order have chosen simply to leave the U.S. market rather than deal with the myriad U.S. reporting, recording and other burdens added to these penalties. Predictably, that has created severe shortages, and the one domestic manufacturer of finished drill pipe, Grant Prideco, continues to indefinitely extend delivery dates.

The drilling industry consumes great quantities of drill pipe, and must replace that pipe on a routine basis. Because of the financial crisis among drilling contractors, most pipe inventories have not been replaced adequately and now that inventories even of used pipe sold by bankrupt companies are exhausted, companies are struggling to buy new pipe. Given the

relatively insignificant component of OCTG that drill pipe represents, it is inconceivable to IADC that the federal government has created artificial shortages with no avenue to seek temporary relief until those shortages subside. The result is a windfall for a select group of steel companies at the expense of an entire industry sector, one that has shrunk to one-fourth its size under the relentless battering of market events, and which was only just beginning to recover.

Under the Voluntary Restraint Agreements (VRA) for steel which expired in 1992, a short supply mechanism existed which provided relief in similar circumstances and with no adverse consequences to the steel industry. When domestic supplies of OCTG were inadequate, petition for the temporary importation of foreign supplies could be made under the short supply procedure permitted by the VRA. H.R. 2822 would restore what had been available to drilling contractors in times of, effectively, no supply.

We urge Congress to pass H.R. 2822.

UNITED STATES HOUSE OF REPRESENTATIVES**Committee on Ways & Means****Statement of Motorola, Inc. in Opposition to H.R. 2822**

Motorola is a leading manufacturer in three industries that have been the target of devastating dumping of imported products in the past -- pagers, cellular phones, and semiconductors. In each case, this unfair activity has been accompanied by hurdles that prevented Motorola from competing fully in the home market of the companies engaged in dumping activities, precluding correction through operation of normal market forces. In each instance, the antidumping law has been activated to correct such behavior, fair market conditions have been restored, and Motorola has been able to maintain a competitive position in these important industry segments. Because H.R. 2822, the Temporary Duty Suspension Act, would undermine the effectiveness, objectivity, due process, and the discipline that have characterized the antidumping law, Motorola strongly opposes the provision.

Motorola opposes H.R. 2822 first because it would undermine the objective character of the antidumping law and inject politics and policy vagaries into the process. The proposed Temporary Duty Suspension Act gives the Commerce Secretary the power to let certain companies ignore an antidumping order whenever he or she decides that "prevailing market conditions" make this a good idea. The legislation establishes no standards for the Secretary, thus opening the possibility that some companies may enjoy more favorable status for an indefinite period of time. There is no right to appeal such a decision to the courts. Thus, America's antidumping statute would be changed from a fair-minded law based on the application of specific legal criteria and procedural requirements designed to ensure due process, into a subjective tool able to be manipulated for political purposes or to carry

out the administration's policy objectives. Arguably, in a political battle to have the Secretary exercise this power, the U.S. industries that have been subject to the most devastating dumping would have the least chance of preventing the dumping that is destroying them, because they will be less robust and influential, and thus less able to mount the political support necessary to resist duty suspensions.

A second, related problem with the Temporary Duty Suspension Act is that it could reward dumpers, particularly those who have succeeded in driving U.S. producers out of a particular market segment, because this would create apparent shortages in U.S. supply of a product, at least in the short-term. Thus, it would be the most egregious dumpers who could most easily argue that the Commerce Secretary should step in to lift the application of an antidumping order to address this "market condition". Moreover, the regulating duty suspension could prevent domestic industries from ever being able to produce the product which is alleged to be in short supply, by allowing dumping to continue, and thereby denying those industries the relief needed to invest in necessary plants and equipment. While proponents of H.R. 2822 argue that a temporary suspension would end as soon as domestic production begins, the very suspension could in fact prevent domestic production from ever developing.

Third, H.R. 2822 is unnecessary. Mechanisms already exist under which the government considers requests to adjust, limit, or eliminate existing antidumping and countervailing duty orders based on allegations that a particular product is not available domestically. The Department of Commerce can adjust the scope of an order during the course of an investigation; this often occurs when a previously-defined like product is not produced in the United States. Alternatively, an existing order can be adjusted during a scope determination. Furthermore, an interested party can petition for review of an order based on changed circumstances. The

International Trade Commission can also exclude “niche” products as part of its injury determination. Unlike the proposed temporary duty suspension provision which has no meaningful standards for decision-making and would rely solely on the Commerce Secretary’s discretion, these statutes and regulations provide standards by which the decisions of the Department of Commerce or the International Trade Commission may be judged.

Fourth, H.R. 2822 would create a strong incentive to abuse the law and would require a time-consuming process at the Commerce Department to analyze. A company seeking to purchase low-priced dumped goods would have every incentive to write its supply specifications so that they do not match the U.S. products available and then to seek a duty suspension on the ground that there is no such product on the market from U.S. suppliers. Each time a purchaser sought to narrowly tailor its specifications so as to exclude U.S. products and seek relief under H.R. 2822, the Department would be faced with the complex and difficult task of trying to decide whether or not existing U.S. products were substitutable. The Department simply does not have the resources to do this.

Finally, the whole precept behind H.R. 2822 misconstrues the purpose of the antidumping laws. The purpose of the antidumping laws is not to exclude imports. Rather, it is a temporary remedy meant to correct unfair practices that harm U.S. industry. Antidumping laws provide a remedy to unfair pricing which is often linked to closed foreign markets. The goal of the statute is to keep the imported products coming into the U.S. at fair competitive prices. Together with consistent efforts to break down foreign market access barriers, the antidumping statute helps to ensure that U.S. companies can compete both here and abroad.

This is the formula that has helped Motorola to become one of the world’s leading manufacturers in three key industries that have been plagued

by unfair foreign competition in past years. Granting even temporary exemptions for unfairly traded products undermines the effectiveness of an extremely important statute. For all of the above reasons, Motorola urges the Committee to reject H.R. 2822.

**BEFORE THE SUBCOMMITTEE ON TRADE
COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES**

**STATEMENT OF THE
NATIONAL ASSOCIATION OF FOREIGN-TRADE ZONES
FOR THE RECORD IN THE HEARING OF APRIL 23, 1996 ON THE
ADMINISTRATION OF THE ANTIDUMPING LAW**

May 7, 1996

The National Association of Foreign-Trade Zones ("NAFTZ," or the "Association") is pleased to submit this statement to the Committee for the record in the subject hearing concerning administration of the antidumping law.

The Association is submitting this statement to express to the Committee our concerns regarding a recent regulatory action taken by the Department of the Treasury ("Treasury Department," or "Treasury"): The issuance of interim regulations pertaining to NAFTA duty deferral programs. *North American Free Trade Agreement (NAFTA)-Implementation of Duty Deferral Program Provisions*, 61 Fed. Reg. 2908 (Jan. 30, 1996) (hereinafter, "Duty Deferral Regulations"). This regulatory action affects the administration of the antidumping law and the operation of U.S. foreign-trade zones.

The NAFTZ is a non-profit organization representing grantees, operators, and users of U.S. foreign-trade zones. Our membership includes state and municipal agencies that sponsor our nation's 211 general-purpose foreign-trade zones in addition to the companies that contribute to local economic activity in their communities through the utilization of foreign-trade zones. The public and private interests represented by the NAFTZ provide our Association with the unique ability to provide a public sector and industry perspective on the Duty Deferral Regulations.

Specifically, the Duty Deferral Regulations are deficient in three important respects:

1. They provide for assessment and collection of antidumping (and countervailing) duties on merchandise made from goods subject to NAFTA drawback under a duty deferral program (including the foreign-trade zones program) that is exported to a NAFTA party, even though Congress neither directed nor authorized Treasury to assess or collect these duties.
2. They provide for collection of the Merchandise Processing Fee on such exported merchandise, even though Congress has provided no authority for this collection and in fact has clarified in legislative history that the Merchandise Processing Fee does not apply in situations such as this one.

3. They were issued retroactively and without adequate opportunity for affected parties, including this Association, to provide comment prior to the time that the Duty Deferral Regulations went into effect.

The NAFTAZ is concerned that the Treasury Department, in issuing the Duty Deferral Regulations, has exceeded its authority in taking actions on subjects that are reserved to the Congress, not the Executive Branch. Each of the specific points is addressed below.

I. There Is No Authority for Collection of Antidumping and Countervailing Duties on Exports to Canada and Mexico of Merchandise Made from Goods Subject to NAFTA Drawback

In § 181.53(a)(2) of the Duty Deferral Regulations, merchandise that is manufactured or processed in a foreign-trade zone from goods subject to NAFTA drawback and exported to Canada, (or, beginning in 2001, to Mexico) is treated as if it were an entry for consumption and is assessed antidumping and countervailing duties under § 181.53(a)(2)(i)(C). We are unable to find any statutory authority for this assessment and conclude that this provision is contrary to law.

Under the antidumping and countervailing duty laws, duties are assessed and collected only on merchandise that is entered for consumption in the Customs Territory of the United States. ^{1/} The Court of International Trade ^{2/} and the Commerce Department ^{3/} consistently have held that

^{1/} See, e.g., the following sections of the antidumping and countervailing duty laws: 19 U.S.C. § 1671b(d)(2) and 19 U.S.C. § 1673b(d)(2) (liquidation of entries for consumption are suspended under countervailing and antidumping duty law, respectively); 19 U.S.C. § 1671e(a) and § 1673e(a) (deposit of estimated countervailing and antidumping duties, respectively, pending liquidation of entries of merchandise, to occur at the same time as normal customs duties on that merchandise are deposited); 19 U.S.C. § 1671e(b) and § 1673e(b) (imposing countervailing and antidumping duties on merchandise entered, or withdrawn from warehouse, for consumption).

^{2/} *Torrington Co. v. United States*, 881 F. Supp. 622, 646 (Ct. Int'l Trade 1995); *Timken Co. v. United States*, 865 F. Supp. 881, 888 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 865 F. Supp. 850, 856 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 862 F. Supp. 413, 420 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 858 F. Supp. 206, 214 (Ct. Int'l Trade 1994); *Timken Co. v. United States*, 852 F. Supp. 1122, 1132 (Ct. Int'l Trade 1994); *Torrington Co. v. United States*, 826 F. Supp. 492, 494 (Ct. Int'l Trade 1993); *Torrington Co. v. United States*, 823 F. Supp. 945, 948 (Ct. Int'l Trade 1993); *Torrington Co. v. United States*, 818 F. Supp. 1563, 1573 (Ct. Int'l Trade 1993), *appeal pending* Nos. 95-1210 and 95-1211 (Fed. Cir. Dec. 7, 1994) (. . . "there is no reason to believe that the use of the term entry in the antidumping duty statute refers to anything other than formal entry of merchandise into the U.S. Customs territory" (emphasis added)).

^{3/} *Tapered Roller Bearings, Four Inches or Less in Outside Diameter, and Certain Components Thereof, from Japan; Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 65,228 (Dec. 16, 1991) ("[O]ur understanding of the term 'entry' in the antidumping law is that it unambiguously refers to release of merchandise into the customs territory of the United States"); *Tapered Roller Bearings, Finished and Unfinished, and Parts Thereof from Japan; Final Results of Antidumping Duty Administrative*

merchandise admitted into a foreign-trade zone is not subject to antidumping and countervailing duties unless and until it is entered for consumption in the U.S. Customs Territory. Because merchandise admitted into a foreign-trade zone and then exported to a NAFTA party never enters the U.S. Customs Territory for consumption in the United States, antidumping and countervailing duties lawfully may be neither assessed nor collected.

In enacting the NAFTA Implementation Act, Congress did not create an exception to the above-stated limitation. Pursuant to NAFTA Article 303(3) as implemented by Section 203(b)(5) of the NAFTA Implementation Act, "a duty" is to be assessed on foreign-trade zone exports to Canada and Mexico of merchandise made from goods subject to NAFTA drawback, but the statutory provision makes no mention of antidumping and countervailing duties. We are aware of nothing in the legislative history of the NAFTA Implementation Act (including specifically, the Statement of Administrative Action accompanying the NAFTA Implementation Act as submitted to the Congress) that states or even suggests that antidumping duties and countervailing duties are to be assessed in addition to ordinary customs duties under this special procedure.

The NAFTA itself lends further support to the conclusion that the duty assessed under Section 203(b)(5) is intended to be an ordinary customs duty, not an antidumping or countervailing duty. NAFTA Article 303(3), upon which this statutory provision is based, is expressly confined by NAFTA Article 318 to ordinary customs duties. ^{4/}

The NAFTA Implementation Act includes a reference to antidumping and countervailing duties in Section 203(e); however, this provision does not itself impose antidumping and countervailing duties on the exported merchandise addressed by Section 203(b). Section 203(e) provides as follows:

INAPPLICABILITY TO COUNTERVAILING AND
ANTIDUMPING DUTIES.--Nothing in this section [i.e.,
Section 203 of the NAFTA Implementation Act] or
the amendments made by it shall be considered to
authorize the refund, waiver, or reduction of
countervailing duties or antidumping duties imposed
on an imported good.

Review, 56 Fed. Reg. 41,506 (Aug. 21, 1991); *Antifriction Bearings from the Federal Republic of Germany, et al.*; *Final Results of Antidumping Duty Administrative Review*, 56 Fed. Reg. 31,703 (July 11, 1991).

^{4/} In defining "customs duty," NAFTA Article 318 provides as follows: "customs duty includes any customs or import duty and a charge of any kind imposed in connection with an imported good, including any form of surtax or surcharge in connection with importation, but does not include any: . . . antidumping or countervailing duty that is applied pursuant to a Party's domestic law and not applied inconsistently with Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters)."

19 U.S.C. § 3333(e). According to its plain meaning, this provision does not impose antidumping and countervailing duties on goods not already subject to antidumping and countervailing duties under other provisions of law. Instead, it provides that where antidumping and countervailing duties are imposed on an imported good pursuant to other authority, nothing in Section 203 is to be construed to provide authority for the refund, waiver, or reduction of those duties. The clear intent of this provision as a preservation of antidumping and countervailing duties provided for by other authority is also evident from an examination of the NAFTA provision it implements, Article 303(2), which provides in relevant part as follows:

No Party may, on condition of export, refund, waive or reduce:

(a) an antidumping or countervailing duty that is *applied pursuant to a Party's domestic law* and that is not applied inconsistently with Chapter Nineteen (Review and Dispute Settlement in Antidumping and Countervailing Duty Matters)[.]

NAFTA Article 303(2) (emphasis added). Neither Article 303, nor any other NAFTA provision of which we are aware, imposes an obligation on the United States to amend its law to assess or collect antidumping and countervailing duties on goods that are not subject to them, including goods exported from foreign-trade zones.

Had Congress intended to grant the Secretary of the Treasury authority to assess and collect antidumping and countervailing duties on the merchandise in question, it would have provided that authority directly and unambiguously, as an exception to the general principle that these duties are assessed and collected *only* where merchandise is entered for consumption in the U.S. Customs Territory. Additionally, we note that regulatory authority over antidumping and countervailing duty matters is exercised by the U.S. Department of Commerce, not the Treasury Department, and the Duty Deferral Regulations are further deficient for this reason.

For all the reasons stated above, the Association concludes that the Duty Deferral Regulations are contrary to law and the intent of the Congress in providing for the assessment and collection of antidumping and countervailing duties on NAFTA exports of goods made from merchandise subject to NAFTA drawback.

II. The Duty Deferral Regulations Improperly Collect the Merchandise Processing Fee on Exports to Canada and Mexico of Merchandise Made from Goods Subject to NAFTA Drawback

Under 19 U.S.C. § 58c(a)(9), the Merchandise Processing Fee (the "MPF" or the "Fee") is imposed on merchandise formally entered or released from warehouse for consumption in the Customs Territory of the United States. The Duty Deferral Regulations exceed the statutory authority of § 58c(a)(9) in assessing and collecting the Fee on merchandise withdrawn from a foreign-trade zone for export to Canada and (beginning 2001) to Mexico.

In Section 8101 of the Omnibus Budget Reconciliation Act of 1986, Pub.L. 99-509 ("OBRA"), Congress amended Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub.L. 99-272, to provide for the assessment of a processing fee on "merchandise that is formally

entered or released." 19 U.S.C. § 58c(a)(9)(A). ^{5/} The statute defines merchandise "entered or released" as merchandise that is:

- (i) permitted or released under section 1448(b) of this title [referring to immediate delivery to the U.S. Customs Territory of perishable goods imported into the United States and released under special permit],
- (ii) entered or released from customs custody under section 1484(a)(1)(A) of this title [referring to merchandise imported into the United States and formally entered for consumption in the Customs Territory by an importer of record] or
- (iii) withdrawn from warehouse for consumption.

19 U.S.C. § 58c(b)(8)(E). Each of these three categories pertains to merchandise entered, or withdrawn from warehouse, for consumption in the U.S. Customs Territory. By these express limitations, OBRA disallows collection of the MPF on merchandise withdrawn for export under foreign-trade zone (or other duty-deferral) procedures that does not involve an entry or withdrawal for consumption in the U.S. Customs Territory. Moreover, Congress resolved any doubt as to the scope of the MPF by stating in the Conference Report to the OBRA that the MPF does not apply to "merchandise which does not formally enter U.S. commerce for consumption." ^{6/}

Despite the clear limitation placed by Congress on the MPF, the Duty Deferral Regulations provide, in § 181.53(a)(2)(i) that documents filed with Customs, when the merchandise at issue is withdrawn from a foreign-trade zone, "constitute an entry or withdrawal for consumption," and in § 181.53(a)(2)(i)(C) that the Merchandise Processing Fee will be assessed. As applied to the MPF, this regulation is contrary to the OBRA, which does not permit collection of the MPF on exported merchandise that has not been entered for consumption in the U.S. Customs Territory.

Furthermore, nothing in the NAFTA Implementation Act modifies the statutory requirement that an entry or release of merchandise to the U.S. Customs Territory must occur before the MPF is assessed. Any such modification would be inconsistent with the NAFTA itself, which excludes from the definition of the term "customs duty" in Article 318 "any . . . fee or other charge in connection with importation commensurate with the cost of services rendered." As a result, neither the NAFTA nor the NAFTA Implementation Act provides a basis for the assessment of a fee such as the MPF on merchandise exported to a NAFTA party under Article 303(3) and U.S. implementing provisions thereunder.

^{5/} Under current law, the MPF is set at a statutory maximum of 0.21 percent *ad valorem* and is subject to downward adjustment by the Secretary of the Treasury in accordance with the statute. 19 U.S.C. § 58c(a)(9)(A). On any one consumption entry, the MPF may not be less than \$25 nor higher than \$485. *Id.* at § 58c(b)(8)(A)(i).

^{6/} H.R. Conf. Rep. 99-1012, 99th Cong., 2d Sess. 388 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 4033.

Finally, the NAFTAZ wishes to point out to the Committee that the application of the MPF in the Duty Deferral Regulations is not only unlawful but also harmful to U.S. manufacturers, including U.S. manufacturers operating in foreign-trade zones. By imposing the MPF on U.S. exporters of products to Canada (and, subsequently, Mexico), Customs is treating these U.S. exporters less favorably than Canadian and Mexican exporters of products to the United States are treated under the NAFTA as effectuated in U.S. law. Under OBRA as amended by the NAFTA Implementation Act, imports into the United States of NAFTA-originating goods of Canada are now exempt from the MPF; NAFTA-originating goods from Mexico may not be charged the Fee in excess of the level in effect on December 31, 1993 (i.e., 0.19 percent *ad valorem* as opposed to the current 0.21 percent) and will become totally exempt from the Fee on June 29, 1999. ^{7/}

III. The Duty Deferral Regulations Were Issued Contrary to the Administrative Procedure Act and Principles of Fundamental Fairness

The Association requests that the Committee take notice that the Treasury Department issued the Duty Deferral Regulations retroactively and contrary to the notice and comment and delayed effective date provisions of the Administrative Procedure Act ("APA"). The regulations were issued in "interim" form, a full month *after* the effective date. The NAFTAZ and its members were not provided an adequate opportunity to object to the Duty Deferral Regulations prior to implementation. In the Federal Register notice, the Treasury Department contends that dispensing with the notice and comment and delayed effective date provisions is justified by the "foreign affairs" exception of 5 U.S.C. § 553(a) as it pertains to the NAFTA. ^{8/}

The foreign affairs exception to the notice and comment and the delayed effective date provisions of the APA is not applicable in these circumstances, and as a result the Duty Deferral Regulations were issued contrary to law. This exception, provided for at 5 U.S.C. 553(a)(1), applies only "to the extent there is involved a foreign affairs function of the United States." Neither the NAFTA nor the NAFTA Implementation Act directs the Treasury Department to impose antidumping and countervailing duties, or the MPF, on the exports at issue. Even had Congress granted Treasury discretionary authority to collect these duties and fees (which it did not), Treasury's attempt to accomplish this collection by a "legislative rule," such as the Duty Deferral Regulations, still would be subject to the delayed effective date and notice and comment provisions of the APA. ^{9/}

By their retroactive application, the Duty Deferral Regulations are also violative of established principles of fundamental fairness. Retroactivity is strongly disfavored in the law because it alters the legal consequences of past decisions. ^{10/} Retroactivity is particularly harmful where parties were not placed on notice of a change in position that affects them adversely. Notably, during the three years between enactment of the NAFTA Implementation Act in December 1993 and the issuance of the interim Duty Deferral Regulations on January 30, 1996, Treasury gave no indication it

^{7/} 19 U.S.C. § 58c(b)(10).

^{8/} 61 Fed. Reg. at 2910.

^{9/} See *American Frozen Food Institute, Inc. v. United States*, 855 F. Supp. 388, 395-396 (Ct. Int'l Trade 1994).

^{10/} See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219; 109 S.Ct. 468, 102 L.Ed. 2d 493 (1988).

would collect the duties and fees at issue. In fact, Treasury issued a notice on September 29, 1995 announcing that it would *not* collect these duties and fees. 11/

For the aforementioned reasons, the NAFTAZ believes that the Treasury Department does not have authority for the assessment and collection of antidumping and countervailing duties and the MPF as set forth in the Duty Deferral Regulations, and that these regulations were issued contrary to law. The Association urges the Treasury Department to take corrective action and appreciates the opportunity to provide these views to the Committee.

11/ U.S. Customs Service, *NAFTA Duty Deferral* (electronic bulletin board notice) (Sept. 29, 1995) at 4.

4/19/96

STATEMENT OF THE SOUTHERN TIER CEMENT COMMITTEE
TO THE TRADE SUBCOMMITTEE OF THE
HOUSE COMMITTEE ON WAYS AND MEANS
CONCERNING THE TEMPORARY DUTY SUSPENSION ACT (H.R. 2822)

INTRODUCTION

This statement is presented on behalf of the Southern Tier Cement Committee (the "Committee"). The Committee is a coalition of the 25 U.S. cement producers listed on Exhibit I. Together, these producers represent 65% of total U.S. production capacity and 75% of the capacity in the southern tier states extending from California to Florida.

Consistent with the Trade Subcommittee's Advisory, I will focus my remarks on the relationship between the antidumping law and U.S. downstream industrial users of gray portland cement. Before doing so, however, I would urge the Trade Subcommittee to consider the very positive impact that antidumping orders have on upstream suppliers. Dumping hurts not only the firms and workers of the affected U.S. industry, it also hurts the firms and workers of the upstream industries that supply raw materials and equipment and build new plants for the affected industry. Under current law, the impact of dumping on upstream suppliers is totally ignored.

My thesis is that the unchecked dumping of cement in this country is contrary to the long-term interests of U.S. consumers. If H.R. 2822 became law, an ad hoc political process would replace the existing non-partisan, impartial administrative process. Foreign producers, foreign governments, their U.S. customers, and their Congressional supporters would vigorously lobby the White House, the State Department and the Commerce Department ("Commerce") to suspend antidumping duties for whatever reasons seem plausible to the uninformed. If the political pressure succeeded, the suspension of antidumping duties would stifle much needed capital investment to maintain and expand production capacity and would allow foreign interests to capture our markets, to the long-term detriment of U.S. cement consumers.

Our industry has had a very disturbing preview of the effects that distorted short supply claims can have on the process. CEMEX, the Mexican cement monopoly, has been attempting to fashion a political end-run of the antidumping order on cement for five years. Its most recent tactic involved false and wildly exaggerated charges that the antidumping order was causing a cement shortage. CEMEX lobbied Commerce and the Administration to revoke the order, even without the encouragement of H.R. 2822. The cement industry's experience should provide the Trade Subcommittee a real world perspective for assessing the concept of temporary duty suspensions.

THE ANTIDUMPING ORDER ON MEXICAN CEMENT

The experience of the U.S. cement industry since the early 1980's vividly demonstrates how the dumping of unfairly priced imports decimated a basic U.S. industry, and how that industry is now on the path to recovery as a direct result of the effective enforcement of our existing trade laws. Before turning to the industry's actual experience, however, let me describe gray portland cement and its market characteristics.

Cement is the binding agent in concrete, which is used in virtually all construction projects. It is quite literally the foundation upon which our country has been built. Cement is a fungible commodity that sells on the basis of price. It is produced in a capital intensive manufacturing process characterized by high fixed costs. Capital intensive industries, like cement, are under significant pressure to operate at high levels of capacity utilization in order to absorb fixed manufacturing costs. In addition, the demand for cement is highly cyclical, tracking regional construction cycles across the country. These industry fundamentals cause significant swings in supply/demand conditions and the industry's profits and losses over the course of the construction cycle.

Historically, the U.S. cement industry has made money at the peak of the cycle and lost money at the bottom of the cycle. Rising capacity utilization rates during cyclical expansions push cement prices and operating earnings upward, providing the cash flow for capital investments to maintain and expand capacity. During the contraction phase of the cycle, prices decline and capacity utilization rates fall. Depressed profits and cash flows at the bottom of the cycle will not support the capital investment needed to maintain and expand the domestic industry to meet U.S. demand.

As an example, during the 1980/1982 recession, cement demand dropped by 24% and the industry's capacity utilization rate fell to 68%. This downturn was followed by a strong economic recovery from 1983 to 1989 in which cement consumption increased 40%. Unlike previous expansions, however, the U.S. cement industry did not benefit from this recovery. The industry lost money throughout this expansion because unfairly priced cement imports displaced domestic production and prevented the natural recovery of prices and profits which were desperately needed by domestic cement companies in order to offset the losses incurred during the 1980/1982 recession.

Foreign cement producers had substantial excess capacity in their home markets during the 1980's. They exported cement to the U.S. market at prices well below their home market prices and, in some cases, below their costs. As shown on Table A in Exhibit 2, from 1981 to 1988, landed import prices fell 24%, from approximately \$45 per ton in 1981 to a low of only \$34 per ton in 1988. In effect, foreign producers used the profits generated in their protected home markets to subsidize low priced exports to the U.S. This predatory pricing enabled them to gain a substantial share of the U.S. cement market at the expense of U.S. producers. As shown on Table B in Exhibit 2, the penetration of cement imports steadily increased from less than 5% of the U.S. market in 1982 to almost 20% by 1987.

This massive intrusion of dumped imports drove down cement prices in the U.S. and severely weakened the financial condition of the industry. As a result, the industry was forced to shut down 10% of its productive capacity, as depicted on Table A in Exhibit 3. Cement companies also reduced their employment base by over 20%. In addition, many U.S.-owned firms were forced to sell cement plants to cash rich foreign producers at substantially discounted prices. From 1975 to 1990, foreign ownership of the U.S. cement industry increased from 5% to 65%.

Southdown's survival and the economic viability of the industry depended on gaining some relief from dumping. At great cost, Southdown organized cement producers in the southern tier states from California to Florida to file antidumping petitions against Mexico, Japan and Venezuela. Fortunately, these actions were successful and resulted in a significant decline in unfairly priced imports after the imposition of duties in 1990 and 1991.

With unfairly traded imports in check, the industry is now beginning to realize the benefits which normally take place during cyclical expansions. The recovery in cement demand since the 1991 recession has resulted in a steady increase in the industry's capacity utilization rate from 81% in 1991 to approximately 90% currently. The resulting improvement in supply/demand conditions has paved the way for a recovery in cement prices from the depressed levels of the 1980's.

The improvement in the industry's profitability and returns has led to a resurgence in capital spending and job creation. At present, numerous capital projects are underway to build new capacity, expand existing capacity and upgrade present facilities. A few examples are listed on Exhibit 4. For the first time in almost 10 years, the industry has announced the construction of new cement plants to replace aging capacity and to meet increased demand.

The temporary suspension of antidumping duties could re-open the floodgates for unfairly priced cement imports at the peak of the cement cycle during periods of high capacity utilization. The cement industry must achieve price and profit gains at the top of the cycle to drive capital investment and job creation. The passage of H.R. 2822 would have a disastrous impact on the industry's willingness to invest. If the industry can't count on the enforcement of our trade laws to prevent dumping at the peak of the business cycle, it would simply be too risky to undertake significant capital investments. If our industry doesn't earn profits at the peak of the cycle, it doesn't earn any profits at all.

A healthy domestic cement industry is in the long-run best interest of producers, downstream consumers and upstream suppliers. The downstream consumer of cement arguably would receive a short-term benefit from the price depression caused by unfairly priced imports. That price depression, however, would not only suppress new investment to expand and modernize U.S. production capacity, but would also cause further disinvestment as experienced during the 1980's. This loss of new and existing investment would hurt cement producers, their workers and upstream suppliers. The short-term pricing benefit to cement consumers would be more than offset by the long-term pricing detriment resulting from lower domestic production capacity and less cost-efficient plants.

It also would be contrary to cement consumers' long-term interests to become dependent on dumped imports. A finding of dumping means the foreign dumper has higher profits at home than on its exports to the U.S. It only exports to utilize excess capacity it cannot absorb on home market sales. During periods of peak demand at home, the foreign dumper will have no incentive to export to the U.S. It simply is not beneficial for U.S. consumers to become reliant on dumped foreign cement since these imports will only be readily available when the cement cannot be sold in the more profitable home markets of the foreign producers.

Thus, temporary suspension of duties could have a long-term adverse impact on both U.S. cement producers as well as the downstream consumers that depend on a readily available supply of the product from modern and cost efficient plants.

PROVIDING FOR DISCRETIONARY SUSPENSION OF ANTIDUMPING ORDERS WOULD POLITICIZE THE PROCESS

Unlike previous short supply amendments, H.R. 2822 would provide Commerce with exceptionally broad discretionary authority to suspend antidumping duties without any statutory criteria or judicial review. Commerce would have the authority to suspend duties in any period in which Commerce determines that "prevailing market conditions" make the imposition of duties "inappropriate". Such a vague standard is an invitation for political intervention.

If enacted, H.R. 2822 would necessarily politicize the process by opening the door for extensive lobbying activities by respondents, foreign governments or any other parties that would benefit from the suspension of duties. Lacking the objective underpinnings of statutory guidelines and judicial review, Commerce's decisions would be tainted with political influence, whether actual or perceived. H.R. 2822 would also undermine the credibility of the United States with its international trading partners because countries exhibiting the gravest foreign policy concern at a particular moment in time would be rewarded with suspended duties.¹

Congress has labored over the years to ensure that agency decisions in antidumping cases are based on the facts presented and the application of detailed statutory standards. H.R. 2822 is contrary to this longstanding policy and would inevitably politicize Commerce's decision making process. In fact, Commerce strongly opposes H.R. 2822, both because of the extreme cost and difficulty in administering such a provision and because the enormous grant of discretion will encourage virtually every importer to seek exemptions from antidumping orders and pursue extensive lobbying campaigns in an effort to influence Commerce's decisions.

¹In commenting on the intent to isolate antidumping decisions from political influence, the U.S. Court of Appeals for the Federal Circuit recently stated:

Antidumping duties are not simply tools to be deployed or withheld in the conduct of domestic or foreign policy. In particular, the independent status of the International Trade Commission was intended to insulate the Government's decision to impose antidumping duties from narrowly political concerns.

Our industry has experienced firsthand how foreign producers will expend substantial sums of money in an attempt to engineer a political fix to a legally valid antidumping order. CEMEX, the Mexican cement monopoly, has been pursuing a massive lobbying campaign over the past five years to remove the antidumping order through political means. CEMEX has gained the support of many members of Congress and some governors by making false claims of a cement shortage. CEMEX used statistics showing that cement demand in the U.S. exceeds domestic productive capacity together with references to increasing cement prices to make the argument that the antidumping order against Mexico was creating cement shortages throughout the country. In fact, however, U.S. cement producers were operating with excess production capacity (approximately seven percent in 1994 and 10 percent in 1995) and imports from other countries² entered the U.S. in sufficient quantities to fill the gap between domestic production and demand in 1994 and to create a substantial surplus in 1995. CEMEX cited a handful of supply problems in a few local markets during the seasonal peak of construction activity in the summer of 1994 and proclaimed a crisis for the U.S. construction industry. CEMEX's self-serving cynicism is underscored by the fact that it told Congress that the antidumping order caused exorbitant price increases, but it certified to the U.S. International Trade Commission that the order has had absolutely no impact on U.S. cement prices.

What CEMEX has consistently failed to mention is that any capacity shortfalls in 1994 were largely the result of a decade of dumping which forced the industry to close approximately 10 percent of its capacity. Suspending duties against CEMEX under the auspices of a perceived short supply situation as envisioned by H.R. 2822 would threaten ongoing expansion projects, would cause domestic cement capacity to contract, and would exacerbate the very capacity shortfall upon which CEMEX's rhetoric is based.

CONCLUSION

The existing dumping laws have been a very effective deterrent to unfairly priced cement imports. Their effective administration has allowed the reemergence of free market conditions to balance supply and demand. The adoption of the temporary duty suspension act would upset this balance in the favor of foreign producers that would dump cement into U.S. markets without fear of retaliation in their protected home markets. The short-term advantage gained by the consumer in the form of lower prices would be more than outweighed by the adverse long-range effects on product availability caused by disinvestment in U.S. productive capacity. Both the industry and the downstream cement users would lose over the long-term.

The U.S. industry has suffered significant injury at the hands of dumped imports. The effective enforcement of our trade laws has allowed the industry to recover and again supply the needs of the American construction industry. This is not the time to weaken remedies against unfairly traded imports by creating loopholes for the worst foreign offenders -- those that dump with impunity and thereby destroy the domestic industry's ability to invest in new plants and equipment needed to produce a

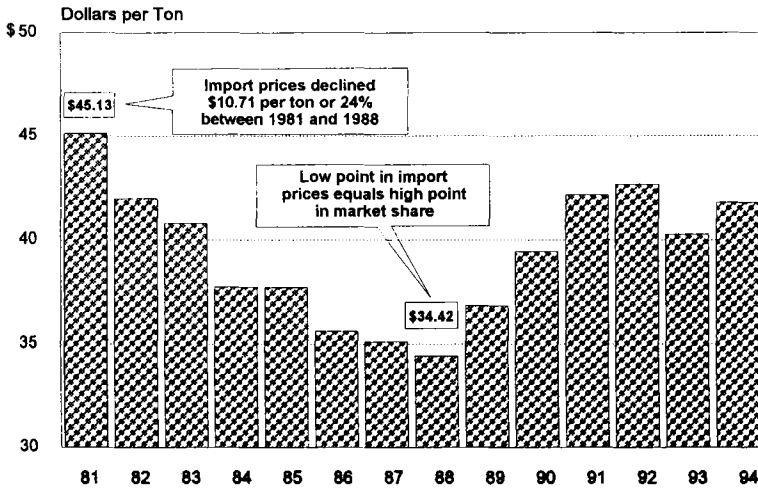
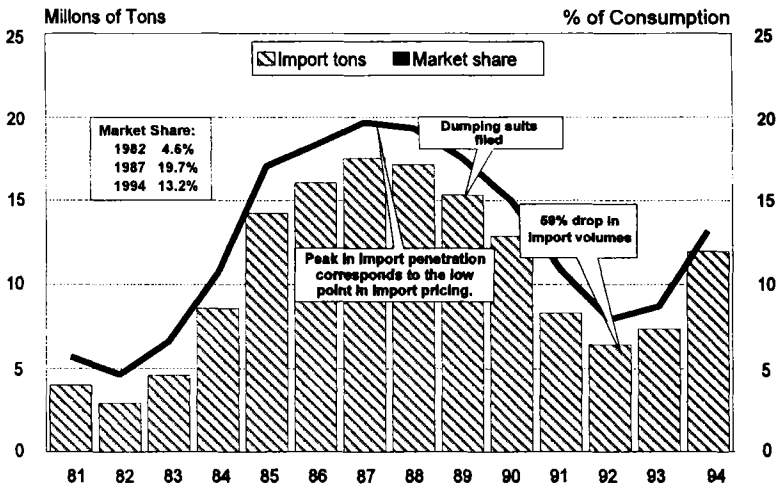
²Cement is a fungible commodity made in virtually every civilized nation. World cement supplies are increasing, as shown on Table B in Exhibit 3.

competitive product. Enacting H.R. 2822 and similar proposals to dilute U.S. antidumping law would go a long way toward destroying the fragile consensus for free trade that exists in the United States today.

For all of these reasons, we respectfully request that the Trade Subcommittee reject this legislation.

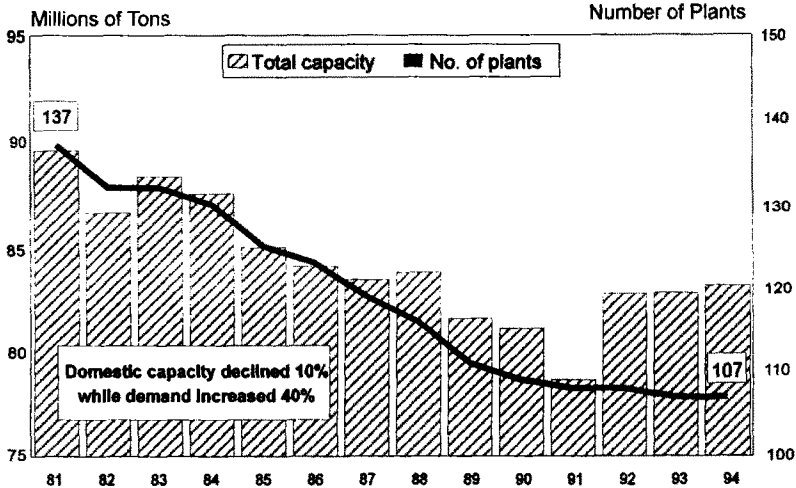
THE SOUTHERN TIER CEMENT COMMITTEE

<u>Company/Headquarters</u>	<u>Plant Locations</u>	
Alamo Cement Company San Antonio, TX	San Antonio, TX	
Arizona Portland Cement Co. Glendora, CA	Rillito, AZ	
Ash Grove Cement Company Overland Park, KS	Chanute, KS Durkee, OR Foreman, AR Inkom, ID	Nephi, UT Louisville, NE Clancy, MT Seattle, WA
Blue Circle Marietta, GA	Atlanta, GA Harleyville, SC Sparrows Point, MD	Calera, AL Ravena, NY Tulsa, OK
Calaveras Cement Co. Walnut Creek, CA	Redding, CA Monolith, CA	
California Portland Cement Co. Glendora, CA	Colton, CA	Mojave, CA
Florida Crushed Stone Co. Leesburg, FL	Brooksville, FL	
Florida Rock Industries, Inc. Jacksonville, FL	Gainesville, FL	
Giant Cement Company Harleyville, SC	Harleyville, SC	
Kaiser Cement Corp. Pleasanton, CA	Cupertino, CA	
Lafarge Corporation Reston, VA	Alpena, MI Davenport, IA Fredonia, KS Grand Cham, IL Independence, MO	Paulding, OH Tampa, FL Whitehall, PA
Lehigh Portland Cement Company Allentown, PA	Gary, IN Leeds, AL Mason City, IA Mitchell, IN	Union Bridge, MD Waco, TX York, PA
Lone Star Industries Stamford, CT	Cape Girardeau, MO Greencastle, IN Sweetwater, TX	Oglesby, IL Pryor, OK
Medusa Corporation Cleveland, OH	Charlevoix, MI Climchfield, GA	Demopolis, AL Wampum, PA
National Cement Co. of Alabama, Inc. Birmingham, AL	Ragland, AL	
National Cement Co. of California, Inc. Encino, CA	Lebec, CA	
North Texas Cement Company Dallas, TX	Midlothian, TX	
Phoenix Cement Company Phoenix, AZ	Clarkdale, AZ	
Riverside Cement Company Diamond Bar, CA	Riverside, CA	Oro Grande, CA
RC Cement Co., Inc. Bethlehem, PA	Stockertown, PA Chattanooga, TN	Festus, MO Independence, KS
RMC Pleasanton, CA	Davenport, CA	
Southdown, Inc. Houston, TX	Louisville, KY Pittsburgh, PA Fairborn, OH Brooksville, FL	Knoxville, TN Lyons, CO Odessa, TX Victorville, CA
Tarmac America, Inc. Medley, FL	Medley, FL	
Texas Industries, Inc. Dallas, TX	New Braunfels, TX Midlothian, TX	
Texas-Lehigh Cement Company Buda, TX	Buda, TX	

Table A. Delivered Import Prices**Table B. Import Volumes & Market Share**

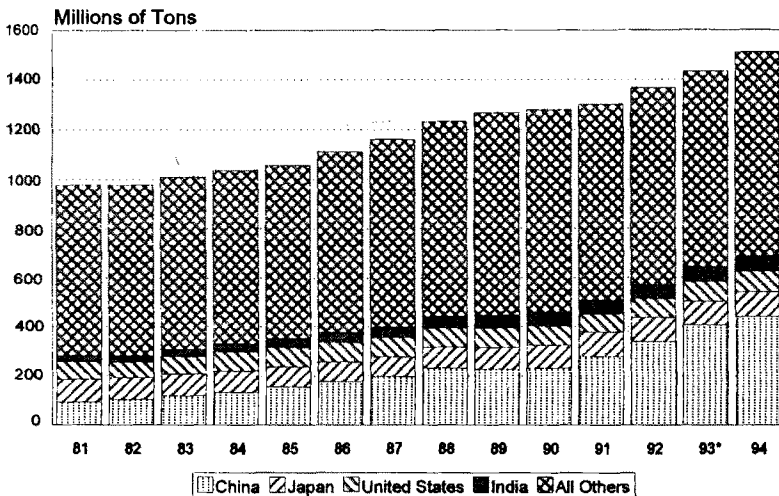
Source: Bureau of Mines Mineral Yearbooks and Department of Commerce Official Import Statistics.

Table C. U. S. Clinker Capacity



Source: PCA Plant Information Summary, 1994.

Table D. World Cement Production



* According to the International Cement Review's "Global Cement Report," world cement capacity was 1,491.1 million short tons in 1993. As shown above, world cement production in 1993 was 1,432.6 million short tons. This leaves an excess cement capacity of 58.5 million short tons for that year.

Source: Bureau of Mines, Cement Annual Report.

Recent Capacity Expansion Investments In The U.S. Cement Industry

<u>Company</u>	<u>Investment Project</u>
Ash Grove	Increasing capacity of Leamington, UT plant from 650,000 to 825,000 tons. Increasing capacity of Durkee, OR plant from 500,000 to 900,000 tons (est. \$85 million)
Blue Circle America	Installing new finish mill to increase cement grinding capacity at Roberta, AL plant (\$22.5 million)
Capitol Aggregates	Installing new finish mill to increase cement grinding capacity at San Antonio, TX plant.
Florida Crushed Stone	Building second kiln at its Brooksville, FL plant to double clinker capacity (est. \$60 million).
Florida Rock Industries	Building 750,000 ton plant near Gainesville, FL (est. \$100 million).
Holnam	Doubling capacity of its Devil's Slide, Utah plant to 700,000 tons by replacing the existing wet kiln with a dry kiln (est. \$75 million). Modernizing and upgrading clinker coolers in Midlothian, TX, Theodore, AL, and Santee, SC plants. Replacing raw mill separator with high-efficiency separator at Theodore, AL plant. Modernizing heating and cooling processes in Davenport, IA and Fredonia, KS plants to increase production and reduce fuel consumption. Investing \$9.7 million in modernization of Paulding, OH plant.
Lafarge	Investing \$135 million in a new facility at an existing cement plant site near Kansas City, MO, increasing capacity by 400,000 tons annually.
Lehigh Portland Cement	Modernizing and expanding project at the Union Bridge, Maryland cement plant, increasing capacity from 1.0 to 1.5 million tons (\$180 million). Upgrading kiln preheater and clinker cooling systems at Leeds, AL plant. Upgrading Macon City, IA plant to increase capacity.
Lone Star Industries	Investing \$15.5 million in a new finish mill and storage facilities at Greencastle, IN plant, increasing cement capacity by 11 percent.
Medusa	Modifying preheater kiln system at Clinchfield, GA plant, increasing cement capacity by 6 percent.
National Cement	Installing a 2,100-tons per day clinker cooler in Lebec, CA cement plant.
Riverside Cement	Centralizing control rooms for gray and white cement plants.
Roanoke Cement	Investing \$37 million to modernize Roanoke, VA cement plant and expand capacity from 1.0 to 1.2 million tons.
Southdown	Investing \$48 million in expansion and modernization of Fairborn, OH cement plant, increasing cement capacity by 120,000 tons per year.
Texas Industries, Inc.	Buying more than 3,400 acres with limestone deposits adjoining Midlothian, TX cement plant.

SPECTRO

ALLOYS CORP

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Rosemount, MN 55068 U.S.A.
FAX: 612/438-3714
Phone: 612/437-2815

April 22, 1996

Attn: Ways & Means Committee on Trade

Thank you for allowing me to state my concerns about a serious matter facing the aluminum industry. My concerns surround a shortage problem which threatens our business, as well as the economy.

Spectro Alloys is a manufacturer of recycled aluminum ingot, which is sold to the automotive, lawn, garden, engine and industrial industries. The total U.S. market is about 3 billion pounds.

For our manufacturing process, we purchase silicon metal. We do not require a higher purity silicon metal, but rather prefer KR1 or KR2 grades of silicon, which contains a maximum of 97.5% silicon.

During the past year 95% of the silicon we purchased came from foreign sources. While there are several U.S. producers of the higher grade silicon, the KR1 or KR2 grades can only be acquired from foreign sources. In addition, most of the production of the higher grade materials is sold to the higher purity price chemical grade silicon market.

Several years ago, the U.S. government enforced substantial duties on foreign silicon, namely from China and Brazil, for dumping all grades of silicon. In the past few years, prices for the lower grade silicon has risen from the low \$.60 to about \$1.00 per pound today.

In addition to prices being high, we cannot buy enough silicon to operate past the second quarter 1996. It is essential that the Chinese & Brazilian duties be dropped in order to avoid a crisis.

Sincerely,



Gregory R. Palen
Chairman/CEO
Spectro Alloys Corp.

STATEMENT OF STEEL MANUFACTURERS ASSOCIATION

The Uruguay Round Agreements Act ("URAA"), which became effective on January 1, 1995, significantly altered and, in many ways, restructured US antidumping law. The URAA changed methodologies and redefined fundamental tenets. No one knows whether a "short supply" problem will develop under the new regime.

Since enactment of the URAA, ten antidumping actions have been filed and only one, which was dismissed on a negative pre-liminary vote at the International Trade Commission ("ITC"), has reached conclusion. The first full investigation is not scheduled to conclude until May 6, 1996.

Only recently has the Department of Commerce published its Notice of Proposed Rulemaking providing both domestic manufacturers and importers with information on potential interpretations of the law by the Commerce Department. It would be premature to alter the structure of the antidumping law until all comments are received, the proposed rules become final, and members of the domestic and importing communities have the opportunity to see how these rules work in practice.

A similar short supply measure was addressed and rejected by both the Ways & Means Committee and the Senate Finance Committee during consideration of the URAA.

After a careful review of the Temporary Duty Suspension Act, H.R. 2822, (otherwise known as the "short supply" proposal) being considered by the Committee on Ways and Means, the SMA and its member companies urge the Committee not to approve this legislation. We have adopted this position for five principal reasons:

- major amendments to the antidumping law were made only one year ago and more experience with the new law is needed before any major structural changes should be considered;
- formal statutory authority for so-called short supply is unnecessary because mechanisms already exist to exempt products that are unavailable in the United States;
- a short supply provision would undermine much of the intellectual justification for the antidumping law;
- in an era of budget restraint, a short supply provision would create an additional bureaucracy;
- finally, there is no limit on the available supply of a product as a result of an antidumping order. The sixteen months since enactment of the new law and the dearth of final decisions simply have not provided enough information to evaluate the impact of the new law before proposing significant changes in it.

The SMA believes that a short supply provision is completely unnecessary. Adequate mechanisms already exist in the law for importers of merchandise to avoid antidumping duties if merchandise is truly unavailable in the United States. Such determinations by the Department of Commerce are possible, either during an investigation or once an order is in place.

During the recent series of wire rod cases, several SMA member companies voluntarily removed two separate products from the scope of their antidumping petition when questions were raised about the industry's ability to provide these products. Had an order been issued in that case, it would not have covered these two products. And this example is not an isolated instance; in other cases, SMA member companies have excluded from their petitions products they do not currently manufacture.

Under existing law, purchasers who believe they cannot obtain needed products from domestic producers have a forum at the ITC during the injury phase of the investigation. If purchasers can show that US producers do not make certain types of products, the ITC has discretion to find that there is no injury as to that specific product or as to all merchandise under investigation.

In one recent case, an SMA member company successfully convinced the ITC that semifinished steel billets imported into the US were not made by the petitioners and, therefore could not be a cause of injury.

Once an order is in effect, purchasers who are unable to obtain products from domestic sources can seek changed circumstances reviews in order to have products excluded from the application of the antidumping order. This authority has been exercised by the Department of Commerce in at least two recent instances. Mechanisms already in the law can ensure that products in short supply are not subject to an antidumping order.

Accordingly, we strongly disagree with the assertion that US antidumping and countervailing duty laws do not consider domestic availability of products subject to these proceedings.

Creating a short supply mechanism could dangerously undercut the intellectual underpinning of the dumping law and would reward unfair traders.

Under the current system, once an order is in place, it has the practical effect of reducing the supply of a given product and thereby increasing its price. With these price increases, the companies in the industry are able to overcome the injury caused by the dumped products. As prices rise, other domestic manufacturers also begin to supply the product.

A short supply provision would undercut this effect by increasing the supply of merchandise at lower, dumped prices. This would place downward pressure on prices, thereby precluding industry recovery and discouraging further investment in the industry by other domestic producers.

For fiscal years 1993 and 1994, the United States Treasury collected over \$537 million in antidumping duties. If H.R. 2822 were enacted and a hypothetical 10 percent reduction in dumping duty collections occurred, the revenue shortfall would be more than \$53 million.

Most importantly, the Congress should remember that anti-dumping duties are applied only to *unfairly priced* imports. Antidumping orders do not impose any limits on supply.

Therefore, there is never truly a "short supply;" there is only a short supply of unfairly priced imports. Importers and domestic users are always free to purchase whatever goods and equipment they wish.

We believe Ways and Means Committee consideration of any short supply provision

is unwarranted.

The problem either does not exist, or may so rarely exist at a de minimis level, a major legislative amendment is totally out of context. If enacted, it would shortly become known as the "trade lawyers employment statute." An antidumping or CVD case requires the retention of lawyers for the complainant and respondent. Under the proposed amendment, affirmative dumping or CVD determinations would routinely trigger short supply relief petitions, again requiring the retention of legal counsel on both sides.

Does the Congress wish to create a continuous legal battle following affirmative findings in CVD or dumping cases?

We strongly recommend against it!



